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In the Supreme Court of the United States

STEVEN L.; MARK L.; JILL L., PETITIONERS

v.

CENTRAL BUCKS SCHOOL DISTRICT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Circuit Court, while explicitly disregarding the relevant two-step analysis set forth by this Court in *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994), properly permitted retroactive application of a new statute of limitations contained in IDEA-2004 (the 2004 Amendments to the Individuals With Disabilities Education Act, which contained no notice of Congressional intent of retroactivity) to destroy claims which existed prior to the effective date of IDEA-2004 under its predecessor statute, IDEA-1997, which contained no statute of limitations.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 3

REASONS FOR GRANTING THE PETITION 4

CONCLUSION 12

APPENDIX

Circuit Court Opinion 1a
District Court Opinion and Order (2/18/2009) 17a
Special Education Appeals Panel decision 40a
Special Education Hearing Officer decisions 56a
Circuit Court Denial of Petition for Rehearing 94a
Petition for Rehearing 95a
Respondent's Circuit Court Letter Brief 110a
Petitioner's Circuit Court Letter Brief 117a

TABLE OF AUTHORITIES

Page

CASES

BAKER v. SOUTHERN YORK AREA SCH. DIST., NO. CIV. A. 08-1741 2009 WL 4793954 (M.D. PA. DEC. 8, 2009) 12
BREANNE C. v. SOUTHERN YORK COUNTY SCH. DIST., 665 F.SUPP.2D 504 (M.D. PA. 2009) 12
BOWEN v. GEORGETOWN UNIV. HOSP., 488 U.S. 204 (1988) 5
D. K. v. ABINGTON SCH. DIST., NO. CIV. A. 08-4914, 2010 WL 1223596 (E.D. PA. MAR. 25, 2010) 12
EVAN H. v. UNIONVILLE-CHADDS FORD SCH. DIST., NO. CIV. A. 07-4990 2008 WL 4791634 (E.D. PA. NOV. 4, 2008) 12
HUGHES AIRCRAFT CO. v. UNITED STATES EX REL. SCHUMER, 520 U.S. 939 (1997) 5
INS v. ENRICO ST. CYR, 533 U.S. 289 (2001) 5, 8, 10
J. L. v. AMBRIDGE AREA SCH. DIST., NO. CIV. A. 06-1652, 2009 WL 1119608 (W.D. PA. APR. 27, 2009) 12
LANDGRAF v. USI FILM PROD., 511 U.S. 244 (1994) 4, 5
LAURA P. v. HAVERFORD SCH. DIST., NO. CIV. A. 07-5395 2008 WL 5000461 (E.D. PA. NOV. 21, 2008) 12
P.P. v. WEST CHESTER AREA SCH. DIST., 557 F.SUPP.2D 648 (E.D. PA. 2008) 12
RIDGEWOOD BD. OF EDUC. v. N.E., 172 F.3D 238 (3D CIR. 1999) 6
SCHOOL DIST. OF PHILADELPHIA v. DEBORAH A., NO. CIV. A. 09-2924 2009 WL 778321 (E.D. PA. MAR, 24, 2009) 12
TCHEREPNIN v. KNIGHT, 389 U.S. 332 (1967) 11
TEREANCE D. v. SCHOOL DIST. OF PHILADELPHIA, 570 F.SUPP.2D 739 (E.D. PA. 2008) 12
WILSON v. ISEMINGER, 185 U.S. 55 (1902) 7
ZOE S. v. WEST CHESTER AREA SCH. DIST., NO. CIV. A. 06-3985 (ORDER) 12

STATUTES

20 U.S.C. § 1401 3
20 U.S.C. § 1415(b)(6)(B) 1, 10
20 U.S.C. § 1415(f)(3)(C) 2, 10, 11
20 U.S.C. § 1415(f)(3)(D) 2, 6, 11
28 U.S.C. § 1254 (1) 1

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit ("Circuit Court") is reported at 618 F.3d 411 (3d Cir. 2010). The unreported decision of the United States District Court for the Eastern District of Pennsylvania ("District Court") is found at Civil Action No. 08-571, 2009 WL 415767 (E.D. Pa. Feb. 18, 2009).

JURISDICTION

The decision of the Circuit Court, reversing the District Court's determination that the new limitations period in IDEA-2004 may **not be** retroactively applied to claims existing under IDEA-2004's predecessor, IDEA-1997, which had no limitations period, was issued on August 18, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

RELEVANT PROVISIONS INVOLVED

20 U.S.C. § 1415(b)(6)(B) provides as follows:

The procedures required by this section shall include the following:

> An opportunity for any party to present a complaint...which set forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a

> complaint under this part, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this paragraph.

* * * *

20 U.S.C. § 1415(f)(3)(C) provides as follows:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

* * * *

20 U.S.C. § 1415(f)(3)(D) provides as follows:

> The timeline described in [20 U.S.C. 1415 (f)(3)(C)] shall not apply to a parent if the parent was prevented from requesting a due process hearing due to -
> (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
> (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent."

STATEMENT

On May 1, 2007, Steven I.'s parents initiated a Pennsylvania administrative Special Education Due Process hearing seeking compensatory education for Steven beginning in the 1997-1998 school year for the Central Bucks School District's failure to provide Steven with a free appropriate public education ("FAPE") during that time period under the IDEA, 20 U.S.C. §§ 1401-1481. A Pennsylvania Special Education Hearing Officer found, in pertinent part, that a new, two year limitations period in the amended IDEA-2004 applied to all of the family's compensatory education claims prior to May 1, 2005 (which date was two years prior to the parents' hearing request), including those claims which existed prior to the effective date of IDEA-2004. The previous version of IDEA as enacted in 1997 had no statute of limitations. In a written decision dated November 7, 2007, a Pennsylvania Special Education Appeals Panel affirmed the Hearing Officer's decision.

Petitioners brought this action in the District Court requesting review and reversal of the Hearing Officer and Appeals Panel decisions regarding their application of a two year statute of limitations, as well as a remand to the Pennsylvania Special Education Hearing Officer for consideration of the family's compensatory education claims prior to May 1, 2005 without retroactive imposition of a statute of limitations. The District Court found in favor of the family, reversed the Appeals Panel's decision on the statute of limitations issue and ordered the matter remanded to the Appeals Panel. Because the district

courts in Pennsylvania were split on this issue, the District Court then granted Respondent's Motion for certification for interlocutory appeal. After the submission of briefs and presentation of oral argument, the Circuit Court on August 18, 2010 reversed the District Court's decision in favor of the family. A timely Petition for Rehearing and Reargument was denied.

REASONS FOR GRANTING THE PETITION

The Circuit Court ignored controlling precedent of this Court by permitting retroactive application of a **newly enacted** statute of limitations to a statute which had **no** statute of limitation. The Third Circuit refused to apply the two-step inquiry mandated by this Court in *Landgraf v. USI Film Prod*,, 511 U.S. 244 (1994) in determining whether the newly enacted statute of limitations in IDEA-2004 may be applied retroactively to claims which arose when no statute of limitations existed. Instead, the Third Circuit relied upon, and misapplied, a century-old decision which predated the recent controlling authority of this Court regarding retroactivity. *See, Wilson v. Iseminger*, 185 U.S. (1902). The Circuit Court decision improperly truncated the rights of minor, disabled children who have been denied an appropriate public education by their public school districts to seek redress for these denials **without explicit statutory authorization by Congress**, and **without recognition of the significant impairment of the rights** of these minor disabled children, both of which were required by this Court in *Landgraf*.

Landgraf and the more recent *INS v. Enrico St. Cyr*, 533 U.S. 289 (2001), both **prohibit** retroactive application of statutes of limitations absent express Congressional intent of retroactive application in the statute itself. In *Landgraf*, this Court explained that the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Id.* at 265. Because there is a presumption against retroactive application of statutes, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997), "the courts, therefore, require from Congress a 'clear intent' that the law should apply to earlier conduct to 'assure[ ] that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.'" *Id.*. "Congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *INS*, 533 U.S. at 316. Moreover, this Court has determined that Congressional intent that a statute be applied retroactively must be clear and unambiguous. *INS*, 533 U.S. at 316-317. Those cases in which this Court has found truly retroactive effect have involved statutory language that was "so clear that it could sustain only one interpretation," as "the standard for finding such unambiguous direction is a demanding one." *Id.*

The Circuit Court acknowledged that IDEA-1997, which was in effect from July 1, 1998 through July 1, 2005, had no statute of limitations for compensatory education claims. (Appx. 2a); *Ridgewood Bd. of Educ. v.*

N.E., 172 F.3d 238 (3d Cir. 1999). Effective July 1, 2005, Congress amended IDEA-1997 to include a complex new limitations period of two years to four years (depending on the circumstances), with certain statutory exceptions. 20 U.S.C. § 1415(f)(3)(D). As the District Court found, IDEA-2004 does not include **any** language suggesting, much less requiring, that the new limitations period be applied retroactively to claims existing prior to the amended Act's effective date. (Appx. 24a).

Landgraf and *INS* also required the Circuit Court to consider whether retroactive application of the new statute of limitations would impair vested rights acquired under the already existing law, create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past. (Appx. 26a-27a). Correctly concluding that such retroactive application would have the impermissible effect of impairing rights the family possessed prior to IDEA-2004, the District Court properly determined that application of IDEA-2004's statute of limitations to claims under IDEA-1997 would attach new legal consequences by extinguishing claims existing before the amendment's effective date. (Appx. 26-27a).

The Circuit Court summarily dismissed as inapplicable this Court's mandatory two-step retroactivity analysis of *Landgraf* and *INS*. Instead, it substituted its own analysis, holding that the Act's seven-month delay between the passage of the Act and its effective date without an express statement of retroactive intent constituted "reasonable notice" to

potential plaintiffs (who are **children with disabilities and their parents**) that claims which accrued prior to the amended Act would be forever extinguished on July 1, 2005. The Circuit Court also gave no consideration, though required to do so by *Landgraf*, to the significant curtailment of the rights of disabled children that its decision created, a fact which the District Court clearly recognized. (Appx. 26a-27a).

The Circuit Court improperly relied upon, and misapplied, this Court's 1902 decision in *Wilson v. Iseminger*, 185 U.S. 55 (1902), which upheld a statute with a revised and shorter statute of limitations via an expressly-created "grace period" to bring claims under the former statute. *Wilson* fully supports the position of Petitioners, as the statute in *Wilson* established an explicit time period to bring claims under the new statute of limitations, thus providing the clear statement of retroactive effect required by subsequent Supreme Court decisions. Unlike the statute in *Wilson*, IDEA-2004 created no such explicit grace period for its new time limitations. IDEA-2004's general delay of several months in implementing the expansive changes in the Act (which went well beyond the new time limits) was plainly not the type of clear "grace period" required by *Wilson*, especially since utterly no notice of either retroactivity or a "grace period" was provided within IDEA-2004, and the School District also provided no such notice to parents regarding the time to bring an action as mandated by IDEA.

Moreover, the jurisprudence of the Supreme Court concerning retroactivity has been substantially clarified and expanded by this Court in the century

following its 1902 decision in *Wilson*. Over the past 20 years, the Court has extensively discussed and defined the inherent difficulties and potential unfairness of retroactive statutes. In the Court's recent decisions, expansive protections have been established to guard against such inherent unfairness. Most notably, this Court made abundantly clear in *INS v. Enrico St. Cyr*, 533 U.S. 289 (2001) that a statute may not act retroactively "absent a clear indication from Congress that it intended such a result." *INS*, 553 U.S. at 316 (citing *Landgraf*). Intent that a statute have truly retroactive effect has been found only where the "statutory language that was so clear that it could sustain only one interpretation." *INS*, 533 U.S. at 316 (citing *Lindh v. Murphy*, 521 U.S. 320, 328, n. 4 (1997)).

The Third Circuit's opinion thus contravened clear decisional authority of this Court, curtailing existing rights of disabled minor plaintiffs and their parents to bring claims under IDEA-1997, which had no statute of limitations. In order to do so, the Circuit Court was required, under the analysis required by *Landgraf* and *INS*, to first look to whether Congress expressed a clear intent that the new statute of limitations in IDEA-2004 should be applied retroactively. Instead, the Circuit Court framed the issue as whether the seven-month period between enactment of the Act and its effective date provided potential plaintiffs with reasonable notice of the new time limitation. (Appx. 4a). Specifically, the Circuit Court concluded that because the "statute of limitations provision" became effective approximately seven months after the passage of the Act, this somehow

constituted a silent seven-month "grace period" which Congress "wrote" into the statute. (Appx. 7a).

While the seven-month delay between passage of the new Act and its effective date arguably put potential plaintiffs on notice of a **new, prospective** time limitation **beginning** on July 1, 2005, it did not and could not put potential plaintiffs (who are disabled children and their parents) on notice that this new limitations period would apply **retroactively** (and silently) to claims existing prior to July 1, 2005. IDEA-2004 contains no hint, let alone the clear, unequivocal expression of congressional intent required by this Court in *Landgraf*, that it would apply to claims existing prior to July 1, 2005. Thus, this alleged period of "reasonable notice" did not, in fact, provide **any** notice of any **new** duty to bring claims which existed under an Act with no statute of limitations. Even the most savvy parent of a disabled child could not have suspected that IDEA-2004 would be given retroactive effect without some specific statement of retroactivity in the Act itself.

Retroactive application of IDEA-2004's amendments to impact past claims is particularly inappropriate under several scores. First, no plain statement was provided by Congress to place citizens on notice of any extinguishment of past claims; surely Congress was aware of the requirement to plainly state any retroactive effect under the extant Supreme Court decisions. "The mere promulgation of an effective date for a statute does not provide sufficient assurance that Congress specifically considered the potential unfairness that retroactive application would produce.

For that reason, a statement that the statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *INS*, 533 U.S. at 316-317. The mere addition of a time limitation - without clear expression of Congressional intent to limit pre-existing claims - simply does not afford citizens notice of a new duty to bring claims which existed under a statute that contained no time limitations.

Second, the limitations on future claims brought under IDEA-2004 is so plainly and thoroughly interwoven with the disabled child's **substantive rights** as to be a substantive part of IDEA rather than some mere "procedural mechanism" as found in lower court decisions cited by the Circuit Court to support retroactivity under very different statutes. The language of IDEA does not create a simple "two-year statute of limitations", but rather establishes two district two-year time periods, together with exceptions to these periods. The first time period involves the time during which a parent must **request due process after learning of** the educational deprivation. 20 U.S.C. § 1415(f)(3)(C) ("within two years of the date the parent or agency knew or should have known about the illegal action that forms the basis of the complaint"). The second time period involves a very different, more **substantive** determination, and entails the **adjudication of the actual period of educational deprivation** beginning at a point two years prior to the date when a parent or agency learned of the deprivation. 20 U.S.C. § 1415(b)(6)(B).

The IDEA therefore does not create a monolithic "two-year statute of limitations," but rather begins with a two-year procedural period to bring a claim **after** a parent knew (or reasonably should have known) of the existence of the claim. **Then**, Section 1415(f)(3)(C) authorizes the Hearing Officer to actually **adjudicate** substantive claims which began at a point two years **before** the parent **or** school entity knew or should have known of the educational deficiency. 20 U.S.C. § 1415(f)(3)(C). Finally, IDEA **also** references broad exceptions which permit claims well beyond the two year period from the parents' knowledge of the existence of the legal claim being raised where the district failed to provide information mandated by IDEA. 20 U.S.C. § 1415(f)(3)(D). IDEA's time frames are thus interwoven with the substantive rights of the child, and render IDEA's time periods far more substantive in nature than the mere procedural time periods in the cases cited by the Circuit Court.

Third, the injured party under IDEA labors under two major legal impediments - the plaintiff is a minor child and an individual with a disability. This fact alone distinguishes cases under IDEA from the *Wilson* case, which involved title to real property. The nature of the injured party in IDEA cases makes the plain statement required by *INS* and it predecessors particularly critical, especially since IDEA is a remedial statute which must be interpreted liberally on behalf of the beneficiary of the statute. *Tcherepmin v. Knight*, 389 U.S. 332, 336 (1967).

While there does not yet appear to be a circuit court split on the issue of retroactivity of IDEA-2004's

new statute of limitations, there has been a significant split among the district courts in Pennsylvania on this issue, thus presaging a Circuit split. For example, while the district courts in *Terrance D. v. School Dist. of Philadelphia*, 570 F.Supp.2d 739 (E.D. Pa 2008); *Zoe S. v. West Chester Area Sch. Dist.*, No. Civ. A. 06-3985 (Order); *Laura P. v. Haverford Sch. Dist.*, No. Civ. A. 07-5395, 2008 WL 5000461 (E.D. Pa. Nov. 21, 2008); and *J. L. v. Ambridge Area Sch. Dist.*, No. Civ. A. 06-1652, 2009 WL 1119608 (W.D. Pa. Apr. 27, 2009) all agreed with the District Court in the instant case that the new statute may not be applied retroactively, several courts have taken the opposite position. See, *P.P. v. West Chester Area Sch. Dist.*, 557 F.Supp.2d 648 (E.D. Pa. 2008); *Evan H. v. Unionville-Chadds Ford Sch. Dist.*, No. Civ. A. 07-4990, 2008 WL 4791634 (E.D. Pa. Nov. 4, 2008); *Baker v. Southern York Area Sch. Dist.*, No. Civ. A. 08-1741, 2009 WL 4793954 (M.D. Pa. Dec. 8, 2009); *Breanne C. v. Southern York County Sch. Dist.*, 665 F.Supp.2d 504 (M.D. Pa. 2009); *School Dist. of Philadelphia v. Deborah A.*, No. Civ. A. 08-2924, 2009 WL 778321 (E.D. Pa. Mar. 24, 2009); *D. K. v. Abington Sch. Dist.*, No. Civ. A. 08-4914, 2010 WL 1223596 (E.D. Pa. Mar. 25, 2010). The fact that such a split of decisional authority exists on this issue across Pennsylvania strongly suggests that such a split is likely to develop among the circuit courts as well.

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
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No. 10-1179

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STEVEN I.; MARK I.; JILL I.,
v.
CENTRAL BUCKS SCHOOL DISTRICT,
Appellant

July 13, 2010, Argued
August 18, 2010, Filed

Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. Civil No. 2-08-cv-00571). District Judge: Honorable John R. Padova

COUNSEL: Scott H. Wolpert, Esq.[ARGUED], Timoney Knox, Fort Washington, PA, Counsel for Appellant.

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Before: RENDELL, JORDAN and GREENAWAY, JR., Circuit Judges.

OPINION OF THE COURT

RENDELL, Circuit Judge.

We are asked on this appeal to resolve a conflict among the district courts in our circuit, most notably in Pennsylvania, regarding the applicability of the statute

of limitations enacted as part of the 2004 amendments to the Individuals with Disabilities Education Improvement Act ("IDEA 2004") to compensatory education claims that are brought after the statute's effective date but that arise from conduct that occurred before the statute's passage.[1] We conclude that, because the statute of limitations did not become effective until seven months after the enactment of IDEA 2004, it is reasonable to apply it to claims based on conduct that pre-dated the law's passage. Accordingly, we will reverse the order of the District Court and remand for further proceedings.[2]

I. *Background*

Steven I. was enrolled in the Central Bucks School District from the 1992-93 school year until his graduation from high school on June 17, 2005. He was first identified as learning disabled in kindergarten, and continued to be eligible for special education programming and services through his high school graduation. On May 1, 2007, Steven I.'s parents initiated a due process hearing seeking compensatory education from the 1997-1998 school year through the filing date[3] for failure to provide a free appropriate public education under IDEA 2004 and Section 504 of the Rehabilitation Act, 29 U.S.C. § 795.

IDEA 2004 was enacted on December 3, 2004. It broke new ground by providing for a two year statute of limitations where there previously had been none. The statute of limitations provision, 20 U.S.C. § 1415(f)(3)(C), took effect on July 1, 2005, seven months after the law was passed.[4] It provides:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint[5], or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.[6]

In concluding that the two-year statute of limitations does not bar claims that accrued prior to the effective date of that statute, the District Court applied the two-part retroactivity analysis that the Supreme Court set forth in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), and *INS v. St. Cyr*, 533 U.S. 289, 316, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), focusing on (1) whether there is clear congressional intent that the statute be applied retroactively, and (2) whether the retroactive application of the statute would have an impermissible effect, that is, would it "take[] away or impair[] vested rights acquired under existing law, or create[] a new obligation, impose[] a new duty, or attach[] a new disability, in respect to transactions or considerations already past." *Landgraf*, 511 U.S. at 269. The District Court noted that the first prong was not satisfied because Congress did not expressly state in IDEA 2004 that its statute of limitations was to be applied retroactively. The District Court further determined that, under the second prong, applying the IDEA 2004 statute of limitations would have an impermissible retroactive effect because to do so would impair rights that Steven I. had prior to the amendment by attaching "new legal consequences to events completed before the amendment's effective date." *Steven I. v. Cent. Bucks*

Sch. Dist., No. 08-571, 2009 U.S. Dist. LEXIS 13331, 2009 WL 415767, at *5 (E.D. Pa. Feb. 18, 2009) (internal citation omitted).

On appeal, the School District urges that we should not apply a retroactivity analysis to the amended statute of limitations and should instead look to whether IDEA 2004, given the seven-month delay between the statute's enactment and the effective date of the statute of limitations provision, gave sufficient notice and a reasonable opportunity for litigants to commence an action based on claims arising in the past. Steven I. responds that the District Court correctly applied the two-step *Landgraf* analysis in concluding that the IDEA 2004 statute of limitations should not apply retroactively.

II. Discussion

The *Landgraf* analysis is typically controlling on issues of retroactivity, in particular the application of new substantive requirements to conduct that occurred in the past. However, because the statute of limitations in IDEA 2004 governs Steven I.'s conduct in filing the claim, not the School District's conduct giving rise to the claim, we need not engage in a retroactivity analysis.[7] "Generally, retroactivity concerns do not bar a changed limitation period's application to a suit filed after the amendment's effective date." *United States v. Simmonds*, 111 F.3d 737, 745 (10th Cir. 1997), *overruled on other grounds by* United States v. Hurst, 322 F.3d 1256 (10th Cir. 2003); *see also* Vernon v. Cassadaga Valley Cent. Sch. Dist., 49 F.3d 886, 890 (2d Cir. 1995) ("Retroactivity concerns, therefore, generally do not bar the application of a changed statute of limitations to

a complaint filed after the amendment . . . . The conduct to which the statute of limitations applies is not the primary conduct of the defendants . . . but is instead the secondary conduct of the plaintiffs, the filing of their suit."); *Forest v. United States Postal Serv.*, 97 F.3d 137, 140 (6th Cir. 1996) (finding that the application of a new statute of limitations is prospective because it applies to the filing of the complaint, which occurred after the statute was enacted); Smith v. Zeneca, Inc., 820 F. Supp. 831, 833 (D. Del. 1993) (finding that retroactivity is not at issue when applying an amended statute of limitations where defendant's conduct occurred prior to the amendment, because "[w]hether or not suit has been filed within the statute of limitations is an act of the plaintiff, not the defendant. The only issue is which law applies to plaintiff's the suit occurred, namely the filing of the claim, does not make application of the new statute of limitations unfair from a "retroactivity" standpoint because the secondary conduct governed by the statute of limitations occurred after its effective date. Id.

The principles governing the application of amended statutes of limitation were first set out by the Supreme Court over 100 years ago:

> [A]ll statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity . . . . It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by

> the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice.
>
> . . . .
>
> This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect.
>
> It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue.
>
> . . . .
>
> In all such cases the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge, and we cannot overrule the decision of that department of the government, unless a palpable error has been committed . . . for what is reasonable in a particular case depends upon its particular facts.

Wilson v. Iseminger, 185 U.S. 55, 62-63, 22 S. Ct. 573, 46 L. Ed. 804 (1902) (internal quotation marks omitted).

Since *Wilson*, courts have routinely noted that an amended statute of limitations cannot be "unfairly

applied" so as to bar an action without providing fair notice and a reasonable time for plaintiffs to bring their claims. *Simmonds*, 111 F.3d at 745; *see also* Ochoa v. Hernandez y Morales, 230 U.S. 139, 161-62, 33 S. Ct. 1033, 57 L. Ed. 1427 (1913) ("[I]t is well-settled that [statutes of limitations] may be modified by shortening the time prescribed, but only if this be done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect.") (internal quotation marks omitted); *Kelly v. Burlington N. R.R. Co.*, 896 F.2d 1194, 1198-99 (9th Cir. 1990) (stating that it would be unfair to apply a new shortened statute of limitations "to a cause of action which accrued prior to the [new] rule without affording the plaintiff a reasonable period in which to file his claim after the announcement of the new limitations period"); *Hanner v. Miss.*, 833 F.2d 55, 57 (5th Cir. 1987) (plaintiffs whose causes of action accrued before a new statute of limitations was enacted should be given a reasonable time within which to bring their actions).

As we noted above, IDEA 2004 was enacted on Dec. 3, 2004 and its statute of limitations provision became effective approximately seven months later, on July 1, 2005. Thus, Congress wrote a seven-month "grace period" into this statute. We are therefore tasked with determining whether this seven-month period provided litigants with reasonable notice[8] and opportunity to bring claims such that imposing a new statute of limitations is not unfair and hence impermissible.

We conclude that the enactment of IDEA 2004 provided sufficient notice of the new statute of limitations. "All persons are charged with knowledge of

the provisions of statutes and must take note of the procedure adopted by them," *N. Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283, 45 S. Ct. 491, 69 L. Ed. 953 (1925) and "a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply," *Texaco, Inc. v. Short*, 454 U.S. 516, 532, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982). Further, we defer to Congress's determination that the seven-month grace period provided sufficient notice to potential litigants:

> It is also settled that the question whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law is a matter on which the Court shows the greatest deference to the judgment of state legislatures. A legislative body is in a far better position than a court to form a correct judgment concerning the number of persons affected by a change in the law, the means by which information concerning the law is disseminated in the community, and the likelihood that innocent persons may be harmed by the failure to receive adequate notice.

Id. (internal citations omitted).

We also conclude that the seven months before the IDEA 2004 statute of limitations became effective provided a reasonable opportunity for litigants to bring any claims that had already accrued. Here, again we defer to Congress's providing for the seven-month grace period, as explained above. Where Congress has enacted a shortened statute of limitations without

allowing any opportunity to bring a previously-accrued claim, we have provided litigants with a grace period as short as 30 days, running from the date of the enactment of the new statutes of limitations. *See* Kołkevich v. Att'y Gen., 501 F.3d 323, 336 (3d Cir. 2007) (allowing 30 days from the date of the REAL ID Act's enactment for aliens to file petitions for review and finding that this 30-day period is reasonable); *see also Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998) (allowing a one-year period from AEDPA's enactment for litigants to bring habeas claims and citing cases from the Ninth, Tenth and Seventh Circuits holding the same), and *Anton v. Lehpamer*, 787 F.2d 1141, 1146 (7th Cir. 1986) (allowing a two-year grace period in which to bring suit after the Supreme Court held that state statutes of limitations apply to claims under 42 U.S.C. § 1983). We see no reason to second-guess Congress's determination that seven months provides a reasonable opportunity for litigants to bring claims.[9]

In *Texaco*, Justice Brennan spoke to the issue of fairness, which balances the need for a grace period when shortening a limitations period, with the need for injured parties to be vigilant in protecting their rights:
The Court has upheld retroactive adjustments to a limitations period only when the legislature has provided a grace period during which the potential plaintiff could reasonably be expected to learn of the change in the law and then initiate his action. In the context of a retrospective statute of limitations, a reasonable grace period provides an adequate guarantee of fairness. Having suffered the triggering event of an injury, a potential plaintiff is likely to possess a heightened alertness to the possibly changing requirements of the law bearing on his claim. Because

redress necessarily depends on recourse to the State's judicial system, the State is free to condition its intervention on rules of procedure, and further, to impose on the potential plaintiff the obligation to monitor changes in those rules. Plaintiffs, and their attorneys, are so aware.

454 U.S. at 549. (Brennan, J., dissenting[10]).

We conclude that the time period between IDEA 2004's enactment and the effective date of its statute of limitations gave Steven I. ample time to become aware of the change in the law and a reasonable opportunity to file a claim based on conduct dating back to 1997. Steven I.'s parents did not initiate a due process hearing until May 1, 2007. Thus, the two-year statute of limitations in IDEA 2004 applies to Steven I.'s claims and bars any causes of action that accrued prior to May 1, 2005.

For the foregoing reasons, we will REVERSE the order of the District COURT and REMAND this case for proceedings consistent with this Opinion.

Footnotes

1*Compare Evan H. v. Unionville-Chadds Ford Sch. Dist.*, No. 07-4990, 2008 U.S. Dist. LEXIS 91442, 2008 WL 4791634 (E.D. Pa. Nov. 4, 2008) (concluding that the IDEA 2004 statute of limitations applies to claims filed after the effective date even if based on conduct that occurred prior to the statute's enactment), *D. K. v. Abington Sch. Dist.*, No. 08-4914, 2010 U.S. Dist. LEXIS 29216, 2010 WL 1223596 (E.D. Pa. Mar. 25, 2010) (same), *Breanne C. v. S. York Cnty. Sch. Dist.*,

665 F. Supp. 2d 504 (M.D. Pa. 2009) (same), and *Sch. Dist. of Phila. v. Deborah A.*, No. 08-2924, 2009 U.S. Dist. LEXIS 24505, 2009 WL 778321 (E.D. Pa. Mar. 24, 2009) (same), with *Tereance D. v. Sch. Dist. of Phila.*, 570 F. Supp. 2d 739 (E.D. Pa. 2008) (concluding that the IDEA 2004 statute of limitations does not bar claims filed after the effective date where the cause of action accrued prior to that date), *Laura P. v. Haverford Sch. Dist.*, No. 07-5395, 2008 U.S. Dist. LEXIS 96190, 2008 WL 5000461 (E.D. Pa.. Nov. 21, 2008) (same) and *J.L. v. Ambridge Area Sch. Dist.*, No. 06-1652, 2009 U.S. Dist. LEXIS 35403, 2009 WL 1119608 (W.D. Pa. Apr. 27, 2009) (same).

2The District Court had jurisdiction under 28 U.S.C. § 1331. The District Court certified the following issue for interlocutory appeal:

> *Whether the statute of limitations under the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act,* 20 U.S.C. § 1415(f)(3)(C), *applies retroactively to Plaintiffs' claims for compensatory education for the time period beginning with the 1997-98 school year and concluding on May 1, 2005.Steven I. v. Cent. Bucks Sch. Dist.*, No. 08-571, 2009 U.S. Dist. LEXIS 44360, 2009 WL 839055, at *1 (E.D. Pa. Mar. 27, 2009). *This is indisputably a question of law, and thus our standard of review is de novo.*

3The School District conceded that Steven I.'s claims, arising between May 1, 2005 and his graduation on June 17, 2005, were not barred by the statute of limitations. The parties independently resolved all claims arising

out of that six-week period. Steven I. also asserts that his graduation from high school was improper, and thus compensatory education would continue to accrue after June 17, 2005. This claim was rejected by the District Court and is not at issue in this appeal.

4IDEA 2004 specified that certain provisions in the statute would take effect on the date of the statute's enactment, December 3, 2004, and that others, including the statute of limitations, would not take effect until July 1, 2005. *See* 20 U.S.C. § 1400, historical and statutory notes.

5IDEA 2004 allows for two exceptions to the statute of limitations when a parent is prevented from requesting a hearing because the local educational agency (1) made specific misrepresentations that it had resolved the problem that formed the basis of the complaint; or (2) withheld information from the parent that the agency was required to provide. 20 U.S.C. § 1415(f)(3)(D). These exceptions are not at issue in this appeal.

6Although irrelevant to this appeal, the general consensus among federal courts is that Pennsylvania does not have a separate statute of limitations applicable to claims for compensatory education. See *Tereance D.*, 570 F. Supp. 2d at 744-45 n.6 (collecting cases).

7The School District also urges that retroactivity is not an issue in this case because procedural rules "may often be applied in suits arising before their enactment without raising concerns about retroactivity." *Landgraf*, 511 U.S. at 275. This is not dispositive here because (1) statutes of limitations "lie on the cusp of the

procedural/substantive distinction," *Vernon v. Cassadaga Valley Cent. Sch. Dist.*, 49 F.3d 886, 892 (2d Cir. 1995) (Cabranes, J., concurring); and (2) while the presumption against retroactivity primarily applies to a statute altering substantive rights, concerns about retroactivity are nonetheless applicable to procedural rules, *Landgraf*, 511 U.S. at 275 n.29. However, *Landgraf's* distinction between procedural and substantive rules is relevant to our analysis in that rules of procedure regulate secondary, rather than primary conduct. *Id.* at 275. Statutes of limitations regulate secondary conduct, *I.e.*, the filing of a suit, not primary conduct, *I.e.*, the actions that gave rise to the suit. Thus, the fact that a new statute of limitations was enacted after the primary conduct giving rise to acts."), *aff'd*, 37 F.3d 1489 (3d Cir. 1994). Thus, retroactivity is not at issue here because it is undisputed that Steven I. filed the claim after the effective date of the statute of limitations.

8In supplemental briefing requested by the Court regarding the "retroactivity" of statutes of limitation, Steven I. mentions for the first time that IDEA 2004, 20 U.S.C. §§ 1415(d)(1)(A) and (d)(2)(E)(1), requires School Districts to give parents a procedural safeguards notice once each year that includes the time period in which to make a complaint. Steven I. states that this requirement provides an affirmative defense and that the School District did not prove that they specifically informed Steven I.'s parents of IDEA 2004's new statute of limitations prior to the effective date. However, Steven I. did not raise this issue before the District Court or in his initial brief on appeal, so it is waived. *See United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) ("It is well settled that an appellant's

failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal."). Further, even if we were to consider this issue, Steven I. graduated prior to the effective date of the statute of limitations so it is unclear whether the School District even had an obligation to inform Steven I.'s parents of the new statute of limitations.

9Judge Schiller raises an interesting point buttressing the soundness of reading congressional intent to apply the new statute of limitations to all existing claims:

> Plaintiffs' proposed reading of IDEA-2004, which would declare it inapplicable to claims involving underlying conduct that occurred prior to its enactment, poses another problem that Congress could not have intended. Under this reading, had Plaintiffs requested their special education due process hearing on February 21, 2008, instead of in 2007, they would be permitted to raise claims relating to conduct from the prior two years (February 21, 2006 to February 21, 2008) and claims from the period prior to July 1, 2005, the date IDEA-2004 took effect, but would be barred from raising claims based on conduct occurring between July 1, 2005 and February 21, 2006. Congress could not have intended such a bizarre outcome.

Evan H., 2008 U.S. Dist. LEXIS 91442, 2008 WL 4791634 at *4.

10The portion of Justice Brennan's dissent that we cite sets forth a principle that appears to be uncontested. Texaco involved a law that extinguished individuals'

pre-existing property interests without specific notice. The dissent distinguished this from cases "involving the application of legislatively foreshortened limitations periods to causes of actions that have already vested," because that is a particular class of cases in which it is reasonable to rely on presumed knowledge of the law when Congress has provided a grace period. 454 U.S. at 549.

No. 10-1179
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STEVEN I.; MARK I.; JILL I.,
v.
CENTRAL BUCKS SCHOOL DISTRICT,
Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. Civil No. 2-08-cv-00571). District Judge: Honorable John R. Padova
Argued July 13, 2010

Before: RENDELL, JORDAN and GREENAWAY, JR., Circuit Judges.

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on July 13, 2010. On consideration whereof, it is now here

ORDERED and ADJUDGED by this Court that the Order of the District Court entered on February 18, 2009, be and the same is hereby REVERSED and the case is REMANDED to the District Court. All of the above in accordance with the Opinion of this Court. The parties shall bear their own costs.

ATTEST:

/s/Marcia M. Waldron, Clerk
Dated: August 18, 2010

CIVIL ACTION NO. 08-571
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN I., MARK I. AND JILL I.

v.

CENTRAL BUCKS SCHOOL DISTRICT

February 18, 2009, Decided

MEMORANDUM

Padova, J.

This action has been brought by Steven I. ("Steven"), a student with learning disabilities, and his parents, Mark I. and Jill I., against the Central Bucks School District (the "School District"). Plaintiffs seek compensatory education from the 1997-98 school year through the present due to the School District's failure to provide Steven with a free appropriate public education ("FAPE") pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.[1] Plaintiffs have appealed the decision of the Pennsylvania Special Education Appeals Review Panel (the "Appeals Review Panel"), affirming the decision of the Special Education Hearing Officer (the "Hearing Officer"), who denied their claim, finding that the two-year statute of limitations in the Individuals with Disabilities Education Improvement Act (the "IDEIA"), 20 U.S.C. § 1415(f)(3)(C), limited their claim to the time period beginning on May 1, 2005, and that the School District had lawfully graduated Steven on June 17,

2005. Before the Court are the parties' cross-motions for summary judgment with respect to the following issues: (1)whether the two-year statute of limitations applies to Plaintiffs' claim for compensatory education, and (2) whether Steven was lawfully graduated from high school on June 17, 2005. For the reasons that follow, both Motions are granted in part and denied in part.

I. BACKGROUND

Steven was a student in the School District from the beginning of the 1992-93 school year through his graduation on June 17, 2005. (Parents Hr'g Exs. 1, 22.) The School District identified Steven as a student eligible to obtain special education services in 1993, when he was in kindergarten. (Sch.Dist.Hr'g Exs. 69-71.) It therefore gave Steven learning support in study skills, English and reading. (Parents Hr'g Exs. 9, 13, 14, 16; Sch. Dist. Hr'g Exs. 2, 67-71, 79.) Steven graduated from high school based upon course credits and a review of a portfolio of his work. (Sch. Dist. Hr'g Exs. 1-3.)

On May 1, 2007, Mark I. and Jill I. initiated a due process hearing seeking compensatory education for Steven from the 1997-98 school year through the present. (Hr'g Officer Ex. 14 at 1.) In their request for a due process hearing, Steven's parents claimed that Steven had not received FAPE since at least the 1997-98 school year because he: 1) was never comprehensively evaluated by the School District; 2) demonstrated very minimal to no progress in basic reading, reading comprehension, math reasoning and numerical operations between 1997 and 2004; 3)

regressed in spelling, written expression, and oral expression between 1997 and 2004; 4) was not evaluated in reading fluency; 5) showed a significant decrease in verbal abilities; 6) was never assessed for visual impairment; and (7) did not make meaningful educational progress under his Individual Education Programs ("IEPs").[2] (Hr'g Officer Ex. 14 at 3-5.) Steven's parents also claimed that Steven did not properly graduate from Central Bucks East High School in 2005 because he did not complete all of the requirements for graduation. (*Id.* at 2.)

Steven's due process hearing took place on June 22, July 25, and July 26, 2007, and the Hearing Officer took testimony and other evidence relating to the propriety of Steven's graduation from high school and the issue of whether Steven's claims were barred by the two-year statute of limitations. (Hr'g Officer Decision at 3, P 5.) Five witnesses testified: (1) the guidance counselor who monitored Steven's credits for graduation; (2) Steven's twelfth grade teacher; (3) Steven's learning support teacher and IEP case manager for tenth through twelfth grades; (4) Jill I.; and (5) Mary Renner, the School District's Supervisor of Special Education. (*Id.* at 4, ¶ 7; N.T. at 483.) On September 25, 2007, the Hearing Officer issued his decision, concluding that the IDEIA's two-year statute of limitations applied to Steven's claims and that Steven was lawfully graduated from high school on June 17, 2005. (Hr'g Officer Decision at 7, ¶ 44 and 8, ¶¶ 1-10.)

Steven's parents filed exceptions to the Hearing Officer's decision. The Appeals Review Panel affirmed the Hearing Officer's decision, in its entirety, on November 7, 2007. (Appeals Review Panel Decision at

13.) Steven's parents argued to the Appeals Review Panel that Steven was unlawfully graduated because excessive absences prevented him from completing the required hours of instruction; the School District's alternative portfolio review process was an invalid assessment; and Steven had failed to earn sufficient credits from course work to graduate. (*Id.* at 6.) The Appeals Review Panel found that, although Steven had frequent absences, the majority of those absences were excused (*id.* at 6-7); Steven's parents had no basis for their argument that he was erroneously given credits for certain course work (*id.* at 7-8); and equitable considerations prevented a ruling in favor of his parents because:

> Neither Parents nor Student initiated any request to continue special education and regular education. Instead, they made abundantly clear that they wanted and expected Student to graduate in June 2005. Parents attended IEP meetings in which the District described in detail the plans for student's graduation. Furthermore, when the District offered the Student the option to continue, Parents refused the option. The District kept Parents and Student fully informed of the graduation requirements and the likelihood that Student would graduate in June 2005 from the beginning of the school year up to and including graduation day. Student did graduate in June 2005. District issued timely and sufficient notice and Parents did not state any objection to the graduation. In fact, all Parental behavior prior to the graduation expressed full support for the graduation.

(*Id.* at 8 (footnote omitted).) The Appeals Review Panel also decided that the "Hearing Officer correctly applied the statute of limitations in effect at the time the Parents filed for due process. It is the date of filing that determines the applicable statute of limitations, not the date of the alleged denial of FAPE." (*Id.* at 8-9.) Noting that Steven's parents filed their due process hearing request on May 1, 2007, the Appeals Panel determined that the two-year statute of limitations limited potential recovery of compensatory education to the period beginning on May 1, 2005. (*Id.* at 9-10.) Consequently, the Appeals Review Panel concluded that the Hearing Officer had "correctly limited the period of potential recovery to May 1, 2005 until graduation on June 17, 2005." (*Id.* at 10 (footnote omitted).)

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id.* "'Where, as here, cross-motions for summary judgment have been presented, we must consider each party's motion individually. Each side bears the burden of establishing a lack of genuine issues of material fact.'" *Neena S. v. Sch. Dist. of Philadelphia*, Civ. A. No. 05-5404, 2008

U.S. Dist. LEXIS 102841, at *17 (E.D. Pa. Dec. 19, 2008) (quoting *Reinert v. Giorgio Foods, Inc.*, 15 F. Supp. 2d 589, 593-94 (E.D. Pa. 1998)).

"In a civil action arising from the administrative adjudication of an IDEA dispute, the district court conducts plenary review of legal conclusions and a 'modified de novo review' of factual findings to provide them 'due weight.'" *Tereance D. v. Sch. Dist. of Philadelphia*, 570 F. Supp. 2d 739, 743 (E.D. Pa. 2008) (citing *S.H*, 336 F.3d at 270-71). In order to give "due weight" to the underlying administrative proceedings, the "[f]actual findings from the administrative proceedings are to be considered prima facie correct." *S.H.*, 336 F.3d at 270 (citing *MM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 531 (4th Cir. 2002)). If we differ from those factual findings, we are obligated to explain our reasoning. *Id.* (quoting *MM*, 303 F.3d at 531). Thus, "[a] federal district court reviewing the administrative fact finder in the first instance is . . . required to defer to the [hearing officer's] factual findings unless it can point to contrary non-testimonial extrinsic evidence on the record." *Id.* (footnote omitted). Where, as here, "the District Court does not hear additional evidence it must find support for any factual conclusions contrary to the [hearing officer's] in the record before it." *Id.* The district court must also "explain why it does not accept the [hearing officer's] findings of fact to avoid the impression that it is substituting its own notions of sound educational policy for those of the agency it reviews." *Id.* (citing *Susan* N., 70 F.3d at 757).

III. DISCUSSION

A. The Statute of Limitations

The IDEA and the regulations implementing Section 504 of the Rehabilitation Act require school districts to provide disabled children with "free appropriate education." *See M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 392 (3d Cir. 1996) (citing 20 U.S.C. § 1400(c)); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (citing *W.B. v. Matula*, 67 F.3d 484, 492-93 (3d Cir. 1995)). A school district satisfies this standard when it provides a disabled student with an IEP which provides "significant learning" and confers "meaningful benefit." *Ridgewood*, 172 F.3d at 247 (internal quotation omitted). In M.C., the United States Court of Appeals for the Third Circuit held that a disabled child who has not received an appropriate IEP is entitled to compensatory education:

> A school district that knows or should know that a child has an inappropriate [IEP] or is not receiving more than a *de minimis* educational benefit must, of course, correct the situation. We hold that, if it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, excluding only the time reasonably required for the school district to rectify the problem.

M.C., 81 F.3d at 391-92.

In December 2004, Congress adopted the IDEIA, which instituted a two-year statute of limitations for claims for compensatory education, to take effect on

July 1, 2005. See *Lawrence Twp. Bd. of Educ. v. New Jersey*, 417 F.3d 368, 370 (3d Cir. 2005). The amendment states as follows:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

20 U.S.C. § 1415(f)(3)(C). Prior to the effective date of the IDEIA, there was no statute of limitations for claims for compensatory education made pursuant to the IDEA in this Circuit. *See Tereance D.*, 570 F. Supp. 2d at 743 ("In the Third Circuit, prior to the IDEIA's amendments, the IDEA did not provide a limitations period for bringing a state-level due process complaint."); *see also Amanda A. v. Coatesville Area Sch. Dist.*, Civ. A. No. 04-4184, 2005 U.S. Dist. LEXIS 2637, at *19 (E.D. Pa. Feb. 23, 2005) (holding, prior to the effective date of the IDEIA, that there "is no limitations period, whether equitable or legal, on a disabled child's claim for compensatory education pursuant to the IDEA").

The Appeals Review Panel explained its application of the statute of limitations in this case as follows:

> The two-year limitation on recovery of compensatory education applies from the date the parent or district knew or should have known that the child was denied FAPE. If the parents

> fail to file for due process within two years of the first "known" or "should have known" denial of FAPE and the denial of FAPE continues through subsequent years and IEPs, the child, through the parents, may still recover compensatory education for the last two years before the due process request was filed. Because the due process request was filed on May 1, 2007, the look back period is limited to the period beginning May 1, 2005. The Hearing Officer correctly limited the period of potential recovery to May 1, 2005 until graduation on June 17, 2005.

(Appeals Review Panel Decision at 9-10 (footnote omitted).) Plaintiffs argue that the Hearing Officer and Appeals Review Panel improperly applied the two-year statute of limitations retroactively to claims that arose before the effective date of the IDEIA. Defendant maintains that the two-year statute of limitations applies in this case because Plaintiffs did not file their request for a due process hearing until after the effective date of the IDEIA. Consequently, the issue before us is whether the two-year statute of limitations imposed by § 1415(f)(3)(C) applies retroactively to claims that accrued before the effective date of the statute when the due process hearing request was not made until after the effective date of the statute.

We utilize a two-step analysis to determine whether a statute applies retroactively. *See Tereance D.*, 570 F. Supp. 2d at 746. "[T]he first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied

retrospectively." *INS v. St. Cyr*, 533 U.S. 289, 316, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001) (citing *Martin v. Hadix*, 527 U.S. 343, 352, 119 S. Ct. 1998, 144 L. Ed. 2d 347 (1999)). "The standard for finding such unambiguous direction is a demanding one" that requires "'statutory language that [is] so clear that it [can] sustain only one interpretation.'" *Id.* (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997)). The IDEIA contains no clear language expressing Congressional intent as to retroactivity. *See Tereance D.*, 570 F. Supp. 2d at 747; *Laura P. v. Haverford Sch. Dist.*, Civ. A. No. 07-5395, 2008 U.S. Dist. LEXIS 96190, at *41 (E.D. Pa. Nov. 21, 2008) ("In this case, the IDEA amendment contains no clear Congressional intent of retroactivity.")

At the second step, we determine whether the application of the statute of limitations would produce "an impermissible retroactive effect." *St. Cyr*, 533 U.S. at 320. Consequently, we examine whether the statute of limitations "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'" *Id.* at 321 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)). There was no statute of limitations applicable to claims for compensatory education in Pennsylvania prior to the IDEIA. Plaintiffs claim that Steven was denied FAPE beginning with the 1997-98 school year, before the effective date of the IDEIA. Consequently, applying the two-year statute of limitations to Plaintiffs' claim for compensatory education would "have the impermissible effect of impairing rights Plaintiffs possessed prior to the

amendment. The new provision would attach new legalconsequences to events completed before the amendment's effective date." *Laura P.*, 2008 U.S. Dist. LEXIS 96190, at *41; *see also Tereance D.*, 570 F. Supp. 2d at 748 (stating that applying the IDEIA to Tearance's due process claim, which accrued prior to the effective date of the IDEIA, would "attach new legal consequences to [plaintiffs' decision not to bring an earlier due process claim], resulting in an impermissible retroactive effect working a manifest injustice"). We find, accordingly, that the IDEIA's two-year statute of limitations on claims for compensatory education does not apply retroactively to bar Plaintiffs' claims which accrued prior to the effective date of that statute.[3] Plaintiffs' Motion for Summary Judgment is, therefore, granted as to their claim that the Hearing Officer and Appeals Review Panel erred by applying the two-year statute of limitations pursuant to 20 U.S.C. § 1415(f)(3)(C) to their claims for compensatory education prior to May 1, 2005. Defendant's Motion for Summary Judgment is denied as to this issue.

B. The Lawfulness of Steven's Graduation From High School

Plaintiffs contend that the Hearing Officer and Appeals Review Panel erred by finding that Steven was lawfully graduated from high school. The School District maintains that the Hearing Officer and Appeals Review Panel correctly ruled that Steven was lawfully graduated on June 17, 2005. The Hearing Officer made the following findings of fact regarding Steven's graduation. Steven had all of the required credits for graduation in English, social studies, science, math, arts and humanities, electives, gym and technology, and he

had completed the requisite ninth grade assessment and eleventh grade project. (Hr'g Officer Decision at 6, ¶ 32.) Steven received the course credits in English, science and social studies necessary for graduation with a regular high school diploma. (*Id.* P 33.) Steven graduated, in part, based on a portfolio review process adopted by the School District pursuant to 22 Pa. Code § 4.52.[4] (*Id.* ¶¶ 34-35) As required by the School District, two individuals, Steven's teacher and Mary Renner, evaluated Steven's portfolio and found that his written work was satisfactory. (*Id.* at 6, ¶ 35 and 7, ¶ 36.) Steven had demonstrated the skills necessary for post-graduate life by June of 2005. (*Id.* at 7, ¶ 37.) The School District notified Steven and his parents that he would graduate on June 17, 2005, and his parents did not object to his graduation. (*Id.* at 7, ¶¶ 38-43.)

Plaintiffs argue that the Hearing Officer erred by inadequately considering whether Steven's absences from school prevented him from completing the hours of instruction required in Pennsylvania and whether he was properly awarded credits for resource room work. They maintain that Steven's excessive absences and repeated failures of courses that the School District required for graduation prevented him from completing the requisite number of course credits for graduation pursuant to 22 Pa. Code § 57.31.[5] The Appeals Review Panel rejected these arguments, noting that the majority of Steven's absences were excused. (Appeals Review Panel Decision at 6-7.) The non-testimonial extrinsic evidence on the record before us shows that 89% of Steven's absences from high school were excused and, thus, does not contradict the decision of the Appeals Review Panel.[6] (Sch. Dist. Hr'g Ex. 2.)

Plaintiffs also maintain that the School District improperly counted resource room classes towards Steven's graduation requirements because Steven failed courses that the School District requires for graduation. The Appeals Review Panel rejected this argument on the ground that it had no legal basis. (Appeals Review Panel Decision at 7-8.) The non-testimonial extrinsic evidence shows that Steven received the requisite units of course credits for graduation if resource room courses are included.[7] (Sch. Dist. Hr'g Ex. 2.) Plaintiffs rely on the Central Bucks School District 2004-05 Course Selection Guide to support their argument that resource room courses could not be substituted for required core subject courses. The Course Selection Guide lists certain required English and social studies courses and the sequences in which they should be taken. (Sch.Dist.Hr'g Ex. 84 at 19-20, 35.) Steven did not pass or receive credit for all of these courses. (See Sch. Dist. Hr'g Ex. 2.) The record does not contain any evidence regarding the subject matter covered in Steven's resource room courses and does not state whether those courses cover the same material as the required English and social studies courses that Steven failed. The Hearing Officer relied on the testimony of Michele McGroggan, Steven's guidance counselor for eleventh and twelfth grades, that Steven's resources room classes count towards graduation and were appropriately counted as fulfilling Steven's English and social studies requirements. (Hr'g Officer Decision at 6, ¶ 9; N.T. at 43-50, 88.)

In determining whether the "'non-testimonial, extrinsic evidence in the record would justify'" a conclusion contrary to that reached by the hearing officer, we

utilize "essentially the same standard of review given to a trial court's findings of fact by a federal appellate court." *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004) (quoting *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 529 (3d Cir. 1995) and citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)). Thus, we may conclude that the non-testimonial evidence justifies a conclusion contrary to that reached by the Hearing Officer where, "after reviewing the evidence, [we are] left with a definite and firm conviction that a mistake has been committed." *Id.* (internal quotation omitted). We find that the Course Selection Guide's references to English and social studies courses that are required for graduation are not sufficient evidence to leave us "with a definite and firm conviction" that the Hearing Officer erred in finding that Steven had completed all of the required credits for graduation in English, social studies, science, math, arts and humanities, electives, gymand technology and that he had received the required number of course credits in English, science and social studies to graduate with a regular high school diploma. (Hr'g Officer Decision at 6, ¶¶ 32-33.)

Plaintiffs also argue that the Hearing Officer erred by ignoring their argument that the School District's local assessment of Steven failed to meet state requirements. Steven's PSSA scores were below basic in English, math and writing. (Sch. Dist. Hr'g Ex. 1.) Consequently, he was verified for graduation by the School District based upon a portfolio review. (*Id.*) Plaintiffs contend that the Hearing Officer erred by finding that Steven's portfolio review met state local assessment requirements. They argue that the School

District did not comply with state law because it utilized only one assessment strategy.

State law provides that each school district must design an assessment system to determine whether students are achieving academic standards. 22 Pa. Code § 4.52(a)(1). Each local assessment system is to employ "a variety of assessment strategies." 22 Pa. Code § 4.52(e). Pennsylvania does not endorse any particular assessment strategy; however, the statute lists nine different strategies that may be utilized. *Id.* (stating that the local assessment system "shall be designed to include a variety of assessment strategies which may include any of the following . . . .") Portfolio review, standardized tests, and examinations developed by teachers are included in the statute's list of possible assessment strategies. See 22 Pa. Code § 4.52(e)(5), (8), (9). The nontestimonial extrinsic evidence demonstrates that the School District utilized all three of these assessment strategies -- examinations developed by Steven's teachers, standardized tests (the PSSAs), and portfolio review -- to assess Steven's academic achievement. (Sch. Dist. Hr'g Exs. 1-3.) Steven graduated based upon both his course credits (determined by examinations developed by Steven's teachers) and his portfolio review. We find, accordingly, that the non-testimonial, extrinsic evidence in the record does not justify a conclusion contrary to that reached by the hearing officer with respect to this issue.

Plaintiffs also argue that the School District's portfolio review failed to meet the School District's own requirements. Plaintiffs contend that two people were required to evaluate Steven's portfolio and that only

Steven's teacher evaluated the portfolio. They further maintain that it is possible that Steven's portfolio contained fewer proficient entries than he needed for graduation. Plaintiffs also argue that Steven's portfolio entries were not appropriately reviewed with respect to the "Reading Independently" standard. All of these arguments rely entirely on testimonial evidence. (Pls.Mem. at 31.) We are required to defer to the factual findings of the Hearing Officer unless we can "point to contrary non-testimonial extrinsic evidence on the record." *S.H.*, 336 F.3d at 270. In this instance, we cannot.

Plaintiffs also argue that the Hearing Officer failed to address their contention that Steven was inappropriately exited from special education. The Hearing Officer found that Plaintiffs were given notice that Steven was slated to graduate and were informed that he could remain in school instead of graduating. (Hr'g Officer Decision at 7, ¶¶ 38-39, 41.) The Hearing Officer also noted that Plaintiffs were sent a Notice of Recommended Educational Placement in June 2005 indicating that Steven was to graduate and that they did not give the School District any indication that they opposed Steven's graduation. (*Id.* ¶¶ 42-43) The non-testimonial evidence establishes that Plaintiffs were notified that Steven was going to graduate and that they could disapprove his graduation and the termination of his educational services. (Sch. Dist. Hr'g Ex. 5, 6, 8.) Steven's January 30, 2004 and December 1, 2004 IEPs addressed his upcoming graduation and post-high school plans. (Sch. Dist. Hr'g Exs. 12 at 15-17; 24 at 11-13.) In the spring of 2004, Plaintiffs asked that Steven be evaluated for post-secondary transition planning. (Sch. Dist. Hr'g Ex. 23 at 2.) The evaluation

report was sent to Plaintiffs in the fall of 2004. (*Id.* at 1.) In addition, Jill I. admitted, during the Due Process Hearing, that she was told during Steven's eleventh and twelfth grade IEP meetings that she had the option of keeping Steven in the School District after the conclusion of his twelfth grade school year and chose not to select that option. (N.T. at 389-90; see also N.T. at 299-300.) We find, therefore, that the non-testimonial extrinsic evidence in the record before us does not justify a conclusion contrary to that reached by the Hearing Officer regarding whether Steven was appropriately exited from special education when he graduated from high school.

We further conclude that the non-testimonial extrinsic evidence on the record before us does not support Plaintiffs' argument that the Hearing Officer and the Appeals Review Panel erred by concluding that Steven was lawfully graduated from high school. Plaintiffs' Motion for Summary Judgment is, accordingly, denied as to the lawfulness of Steven's graduation from high school and Defendant's Motion for Summary Judgment is granted as to this issue.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Summary Judgment is granted as to their argument that the Hearing Officer and Appeals Review Panel incorrectly applied a two-year statute of limitations to their claim for compensatory education and denied as to their argument that the Hearing Officer and Appeals Review Panel erred by finding that the School District properly graduated Steven in June 2005. Defendant's Motion for Summary Judgment is denied as to its

argument that the Hearing Officer and Appeals Review Panel properly applied a two-year statute of limitations to Plaintiffs' claim for compensatory education and granted as to its argument that the Hearing Officer and Appeals Review Panel correctly ruled that Steven was lawfully graduated by the School District. This action is, accordingly, remanded to the Appeals Review Panel to determine Steven's entitlement to compensatory education from the 1997-98 school year through May 1, 2005.

An appropriate Order follows.

ORDER

AND NOW, this 18th day of February, 2009, upon consideration of Defendant's Motion for Summary Judgment (Docket No. 12), Plaintiffs' Motion for Summary Judgment (Docket No. 13), and all documents filed with respect thereto, **IT IS HEREBY ORDERED** as follows:

1. Defendant's Motion for Summary Judgment is **DENIED** insofar as it asks us to find that the Special Education Hearing Officer ("Hearing Officer") and Special Education Due Process Appeals Review Panel (the "Appeals Review Panel") properly applied a two-year statute of limitations in this case and **GRANTED** insofar as it asks us to find that the Hearing Officer and Appeals Review Panel properly found that Steven I. was lawfully graduated from high school.

2. Plaintiffs' Motion is **GRANTED** insofar as it

asks us to find that the Hearing Officer and Appeals Review Panel improperly applied a two-year statute of limitations in this case and **DENIED** insofar as it asks us to find that the Hearing Officer and Appeals Review Panel improperly found that Steven I. was lawfully graduated from high school.

3. **JUDGMENT** is entered in favor of Plaintiffs, reversing the decision of the Appeals Review Panel insofar as it found that Plaintiffs' claims for compensatory education accruing prior to May 1, 2005 were barred by a two-year statute of limitations.

4. **JUDGMENT** is entered in favor of Defendant, affirming the decision of the Appeals Review Panel insofar as it found that Steven I. was lawfully graduated from high school.

3. This matter is **REMANDED** to the Commonwealth of Pennsylvania Special Education Due Process Appeals Review Panel to determine, consistent with this Memorandum and Order: 1) the entitlement, if any, of Steven I. to compensatory education from the 1997-98 school year until May 1, 2005, and 2) the nature and amount of any such compensatory education award.

3. The Clerk of Court shall **CLOSE** this case statistically.

BY THE COURT:
/s/ John R. Padova

John R. Padova,

Footnotes

1 The parties have settled their dispute with respect to the time period between May 1, 2005 and Steven's high school graduation on June 17, 2005 and Plaintiffs do not seek an award of compensatory education for that time period. (Compl. ¶ 1 n.2.)

2 "[A]n Individual Education Program (IEP) is the primary vehicle for providing students with the required free and appropriate education." *S.H. v. State-Operated Sch. Dist.*, 336 F.3d 260, 264 (3d Cir. 2003) (citing *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 756 (3d Cir. 1995)). The United States Court of Appeals for the Third Circuit has explained that an "IEP is a written statement developed for each child that must include several elements[,]" including the student's "current level of performance, and how her disability affects her performance." *Id.* (citing 20 U.S.C. § 1414(d)(1)(A)). The IEP must also "set measurable annual goals relating both to progress in the general curriculum and additional educational needs arising from her disability." *Id.* (citing 20 U.S.C. § 1414(d)(1)(A)(ii)). In addition, the IEP "must detail those special education services and supplementary aids that the school will provide, explain how they will contribute toward meeting the annual goals, how they will allow the child to progress in both the general curriculum and participate in extracurricular activities, and describe how the child will interact with disabled and nondisabled children." *Id.* (citing 20 U.S.C. § 1414(d) (1)(A)(iii)). The IEP must also explain the

assessments that will be used to measure the student's progress. *Id.* (citing 20 U.S.C. § 1414(d)(1)(A)(v)).

3 But *see P. P. v. West Chester Area Sch. Dist.*, 557 F. Supp. 2d 648, 660 (E.D. Pa. 2008) (determining that the two-year statute of limitations provided by the IDEIA applied to P.P.'s claims for compensatory education because plaintiffs' requested their due process hearing after the effective date of the IDEIA) and *Evan H. v. Unionville- Chadds Ford Sch. Dist.*, Civ. A. No. 07-4990, 2008 U.S. Dist. LEXIS 91442, at *11 (E.D. Pa. Nov. 4, 2008) (determining that the application of the two-year statute of limitations to claims for compensatory education that accrued prior to the effective date of the IDEIA was not impermissibly retroactive). While we understand our learned colleagues' reasoning, we find the retroactivity analysis of *Tearance D.* and *Laura P.* more persuasive.

4 Title 22, Pennsylvania Code, Section 4.52, directs school districts to develop assessment systems to determine whether students are achieving academic standards. 22 Pa. Code § 4.52(a)(1). The assessment systems may include any of the following:

> (1)Written work by students[;] (2) Scientific experiments conducted by students[;] (3) Works of art or musical, theatrical or dance performances by students[;] (4) Other demonstrations, performances, products or projects by students related to specific academic standards[;] (5)Examinations developed by teachers to assess specific academic standards[;] (6) Nationally-available achievement tests[;] (7) Diagnostic assessments[;] (8) Evaluations of

> portfolios of student work related to achievement of academic standards[;] (9) Other measures as appropriate, which may include standardized tests.

22 Pa. Code § 4.52(e).

5 Title 22, Pennsylvania Code, Section 57.31, states that, in order to graduate, a student must complete 120 hours of instruction in the following 21 units of course credit: four credits in English, three credits in math, three credits in science, three credits in social studies, two credits in arts or humanities, one credit in health and physical education, and five credits in other courses. 22 Pa. Code § 57.31(a).

6 All of Steven's absences during his freshman and sophomore years of high school were excused. All but four of his absences during his junior year were excused, and all but 15 and 1/2 of his absences during his senior year were excused. (Sch. Dist. Hr'g Ex. 2.)

7 Steven's transcript shows that, including resource room courses, he received 4.5 units of course credit for English; 4 units of course credit in social studies; 3 units of course credit in science; 3 units of course credit in math; 3 units of course credit in arts and humanities; 1.66 credits in health and physical education; and 7.84 course credits in other courses. (Sch. Dist. Hr'g Ex. 2.) Steven's Credit Check and Graduation Log shows that he received 4 credits in English, 4 credits in social studies, 4.5 credits in arts and humanities, 3 credits in science, 3 credits in math, 1.5 credits in physical education, and 5.5 credits in other courses. (Sch. Dist. Hr'g Ex. 2.) While we do not understand the

discrepancy, both documents show that Steven earned sufficient course credits to graduate.

This is a redacted version of the original appeals panel decision. Select details may have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

OPINION No. 1850
SPECIAL EDUCATION DUE PROCESS APPEALS REVIEW PANEL
COMMONWEALTH OF PENNSYLVANIA

IN RE THE EDUCATIONAL ASSIGNMENT : SPECIAL EDUCATION OF S.I., A STUDENT IN THE : CENTRAL BUCKS SCHOOL DISTRICT

BEFORE APPEALS PANEL OFFICERS MCAFEE , SKIDMORE and ZIRKEL, OPINION BY MCAFEE, APPELLATE OFFICER

BACKGROUND

The Student who is the subject of this appeal is a xx year-old resident of the District who was formerly enrolled in District schools. District served Student as a student with a specific learning disability until Student completed graduation requirements in 2005.[1] Parents initiated this due process hearing seeking compensatory education from the 1997-1998 school year to the date of Student's graduation.

In 1993, the District identified Student as a student with specific learning disabilities in reading and language arts[2] Parents expressed concern about Student's achievement in reading and writing as early as 1997.[3] In May 2000, during Student's 8th grade year, District provided extended school year (ESY) services

using the Wilson Reading program "to improve reading skills to a third grade level."[4] Student continued to struggle with reading, writing, and mathematics but District records show that Parents were told Student made progress every year. On May 9, 2002 the Wilson Reading teacher reported that Student was about to complete the Wilson program. The IEP of May 10, 2002 included results of a curriculum-based assessment (CBA) in which Student's instructional level in reading was 7th grade and a Brigance Writing Inventory at the 5th/6th grade.[5] Documents provided by the District and the Parents show a consistent pattern of failing grades and below age achievement in reading, writing and mathematics.[6] The District provided these documents among others (e.g., PSSA results) to the Parents. Thus, Parents were well aware of Student's continuing deficiencies in reading, writing and mathematics. The documents also demonstrate that despite continuing struggles, Student did make educational progress (see for example the IEP of May 2002). Student was also frequently truant and had some minor disciplinary incidents, especially during the secondary school years.[7] The Parents provided excuses for many of the absences and the disciplinary incidents.

At the first session of the hearing held on June 22, 2007 counsel for the Parents identified two primary issues:

> 1. Was student improperly graduated?
> 2. What is the applicable statute of limitations if any for compensatory education claims under IDEA and Section 504 of the Rehabilitation Act of 1973? [8]

On July 23, 2007 the Hearing Officer issued an interim order determining that the Parents, not the District, would bear the burden of proof on the statute of limitations and ruling that the "continuing violations" doctrine did not apply[9]. On September 6, 2007 the Hearing Officer issued a second interim order ruling that the Parents failed to establish an exception to the two-year statute of limitations imposed by The Individuals with Disabilities Education Act (IDEA) of 2004.[10] The Hearing Officer also ruled that "the Student was lawfully graduated on June 17, 2005."[11]

Because the parties had resolved all remaining issues, a final order was entered on September 25, 2007 at which the Hearing Officer stated, "The Hearing Officer incorporates herein the Interim Order and Second Interim Order in their entirety."

The Hearing Officer further ordered, "In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Parents are not entitled to any relief for the due process hearing request filed May 1, 2007."

ISSUES

Parents filed Exceptions via a 31-page document dated October 1, 2007. This Panel received Exceptions and the record on October 16, 2007. Parents Exceptions are:

> Exception One: The Hearing Officer Erred by Placing the Burden of Proof with Respect to the Affirmative Defense of a Statute of Limitations Period On the Parents.

> Exception Two: The Hearing Officer Erred by Failing to Apply the Continuing Violations Doctrine.
>
> Exception Three: The Hearing Officer Erred by Applying a Two Year Statute of Limitations Period on Parent's Compensatory Education Claims.
>
> Exception Four: The Hearing Officer Erred by Finding the Parents Failed to Meet the Exceptions to the Statute of Limitations Under IDEA.
>
> Exception Five: The Hearing Officer Erred by Concluding that [Student] was Properly Graduated by the District.

The District filed a response via an undated 51-page document received by this panel on or about October 19, 2007. The District responded to all Parental Exceptions. It is more logical to address the issue of graduation before we address issues three through five because our deliberations and decisions on the remaining issues are at least partially dependent on whether student was properly graduated in 2005. Furthermore this panel must determine the proper outcome with regard to issue three before we make a determination for issues two and four. Accordingly, we have altered the sequence of issues discussed below.

DISCUSSION

A. Scope of Review- In many previous decisions, this Panel has addressed its scope of review, as enunciated

in *Carlisle Area School District v. Scott P.*[12] where the Third Circuit said:

> "We thus hold that appeals panels reviewing the fact findings of hearing officers ... should defer to the hearing officer's findings based upon credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion.[13]" The issues in this case are mixed. Some are questions of law. Others are disputed facts. However, the disputes over facts do not hinge on determinations of credibility but rather the application of the facts to the law. Thus, our review in this case is plenary.

B. Burden of Proof. Counsel for the Parents argues that the Hearing Officer incorrectly assigned the burden of persuasion to the Parents with regard to the statute of limitations. However this argument is misplaced in the current case.

Burden of proof applies to issues of fact. Thus, debate over the burden of proof is not applicable. Moreover, we need not determine which side has the burden of persuasion regarding the statute of limitations because to the limited extent that it included subordinate issues of facts, such as the limited exceptions, the preponderance of evidence favors the District, thus making the burden of persuasion immaterial. Therefore, this Exception is denied.

C. Graduation. The Hearing Officer determined that Student had graduated in June 2005. The regulations in effect at the time of the graduation are clear.[14]

> (a) General. The obligation to make FAPE available to all children with disabilities does not apply with respect to the following:
> (3)(i) Students with disabilities who have graduated from high school with a regular high school diploma.
> (iii) Graduation from high school with a regular diploma constitutes a change in placement, requiring written prior notice.. .

The Parents assert that the District unlawfully graduated the Student based upon three alleged errors in the District's procedures:

> 1. Student's absences prevented Student from completing the required hours of instruction.
> 2. The District's alternative local assessment was invalid.
> 3. The Student failed to receive the requisite number of credits to graduate.

Although Student was frequently absent during the twelfth grade year, the majority of the absences were excused absences. Parents assert that District erroneously classified many Student absences as excused, and that the District should have included a plan to address the absences in the IEP. There is no evidence in the record that Parents sought the District's help to address the absences. More importantly, Parents enabled the continuing absences by providing excuses.15 The Parents have not cited,

and we do not know of any judicially construed requirement that a student must be physically present in school to complete "hours of instruction." We note that the term is "hours of instruction," not "hours of attendance." The hours of instruction requirement refers to the allotment of instructional time that a district must provide to address a specific subject. It is possible for a student to complete required assignments, exams and other activities in many ways other than a specified number of hours of attendance (and indeed students receiving homebound instruction so benefit). The District evaluated Student's work using an alternative assessment, which is permissible under Commonwealth law.[16] Parents incorrectly interpret the law to require a variety of assessments for an individual student. Instead, the law requires that Districts develop a system that may include a variety of assessment strategies. The purpose of this variety is to enable districts to use different strategies to meet the needs of different students, rather than forcing districts into a "one size fits all" approach.

Finally, Parents assert that the District erroneously awarded credit for classes student completed in whole, or in part, in the resource room. Again, the Parents have not offered and we have not found any legal basis for this argument. Parents assert that the resource room placements demonstrated Student's "inability to make educational progress in a regular education setting." On the contrary, resource room services have been viewed by the courts as supplemental aids and services designed to enable a student to benefit from regular education classes.[17]

In addition, even if we were to conclude that the District's actions in graduating student did not meet the full measure of the requirements, equitable considerations would force us to rule against the Parents. Neither Parents nor Student initiated any request to continue special education and regular education. Instead, they made abundantly clear that they wanted and expected Student to graduate in June 2005. Parents attended IEP meetings in which the District described in detail the plans for student's graduation. Furthermore, when the District offered the Student the option to continue,18 Parents refused the option. The District kept Parents and Student fully informed of the graduation requirements and the likelihood that Student would graduate in June 2005 from the beginning of the school year up to and including graduation day. Student did graduate in June 2005. District issued timely and sufficient notice and Parents did not state any objection to the graduation. In fact, all Parental behavior prior to the graduation expressed full support for the graduation.

In consideration of the facts, the statutory and regulatory requirements, and the equities, this Exception is denied.

D. Two -Year Statute of Limitations. Counsel for the Parents asserts that IDEA 2004, which went into effect on July 5, 2005, may not be applied retroactively to alleged denials of FAPE that occurred before July 1, 2005. The Hearing Officer correctly applied the statute of limitations in effect at the time the Parents filed for due process. It is the date of filing that determines the applicable statute of limitations, not the date of the

alleged denial of FAPE. In a previous decision,[19] the Panel stated:

IDEA 2004 includes an explicit limitations period for due process claims. In pertinent part, the statute reads:

> "A (party) shall request an impartial due process hearing within two years of the date the (party) knew or should have known about the alleged action that forms the basis of the complaint...."[20]
>
> While the language of the statute is written going forward from the date the aggrieved party knew or should have known of the alleged claim, the practice of hearing officers and the panel in Pennsylvania has been to work backwards from the date the party filed for due process. In this case, both methods of calculation lead to the same limitations period.

Thus, the two-year statute of limitations included in IDEA 2004 applies prospectively to the time to file a due process request and is applicable to all due process hearings filed after July 5, 2005.21 As we have also previously explained, the language in IDEA 2004 about the triggering or accrual of the compensatory education claim leads to the same result. The two-year limitation on recovery of compensatory education applies from the date the parent or district knew or should have known that the child was denied FAPE. If the parents fail to file for due process within two years of the first "known" or "should have known" denial of FAPE and the denial of FAPE continues through subsequent years and IEPs,the child, through the parents, may still recover compensatory education for the last two years

before the due process request was filed. Because the due process request was filed on May 1, 2007, the look back period is limited to the period beginning May 1, 2005. The Hearing Officer correctly limited the period of potential recovery to May 1, 2005 until graduation on June 17, 2005.[22]

E. The Continuing Violations Doctrine. Parents argue that the continuing violations doctrine allows Parents to seek recovery of compensatory education beyond the two-year limitation asserted by the Hearing Officer. We disagree.

More specifically, we agree that the continuing violation doctrine applies, but not at all in the way the Parents seeks in this case. Rather, the doctrine applies only to the limited extent to save the last two years of a continuing violation of FAPE. As we explained above, if the Parent fails to file for due process within two years of the first "known" or "should have known" denial of FAPE and the denial of FAPE continues through subsequent years and IEPs, the child, through the parents, may still recover compensatory education for the last two years before the due process request was filed. None of the cases on continuing violations cited by the Parents is binding in our jurisdiction and there is at least equal authority on the other side since enactment of IDEA 2004.[23] More importantly, the statutory history reveals that Congress intended the continuing violations doctrine not to extend the period of recovery retrospectively, but to protect the right to file for due process prospectively from the accrual date of the alleged denial of FAPE. Specifically, the legislative history clearly provides:

> "Where the issue giving rise to the claim is more than two years old and not ongoing the claim is barred; where the conduct or services at issue are ongoing to the previous two years, the claim for compensatory education services may be made on the basis of the most recent conduct or services...." S. Rep. 108-85, at 40 (2003).

This Exception is denied.

F. Exceptions to the Two-Year Limitation. IDEA 2004 and the subsequent regulations permit two specific exceptions to the two-year limit:

> (D) EXCEPTIONS TO THE TIMELINE.-The timeline
> described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to –
> (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
> (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.

Parents assert that both exceptions to the two-year limit apply in this case.

With regard to specific misrepresentation, Parents allege that the District continually and erroneously communicated that the Student was making progress. The Hearing Officer in her Second Interim Order enumerated the communications between the parties that the Parents claimed to be specific

misrepresentations.[24] We agree with the Hearing Officer that the communications were not misrepresentations, nor did they prevent the Parents from requesting a hearing. The District provided Parents with an accurate assessment of Student's functioning throughout. For example, Parents assert that District agreed to "fix any problems" related to the Student's program; however Parents erroneously interpret fixing the problems as equivalent to rectifying Student's disability. Specifically, Parents allege that Student's standard scores on standardized tests such as the Wechsler Individual Achievement Test remained approximately constant.[25] Parents misinterpret the constant scores as lack of progress because they remain the same; but standard scores are expressions of a student's performance in relation to his/her peers on graded materials. Thus, standard scores of 75 in 1997 and 2004 indicate that the Student maintained exactly the same level of performance in relationship to his peers, who on average had advanced seven years. Thus Student had also advanced. Such results are within the reasonable range of expectations if the original diagnosis of the Student's disability and general ability were correct, and which Parents failed to challenge in this case. Thus, we conclude that not only did the District not misrepresent the Student's progress, but that Student made progress commensurate with his ability. The Parents' claim confuses alleged denials of FAPE, which go to the merits of the case, with the exceptions for the limitations that Congress limited to narrow exceptional circumstances that would prevent the Parents from filing for a hearing. More importantly, Parents also testified that the Student's IEP case manager and teacher were honest when speaking to the Parent.[26]

Similarly, we must conclude that the District did not withhold information from the Parents. Parents testified that District produced every document/record requested. More importantly, Parents' behavior throughout Student's school career clearly shows that they were well aware of Student's struggles and low achievement.

Our interpretation of the exceptions component of the statute is that it requires flagrant or bad faith behavior on the part of the District to trigger exceptions to the two-year limitation. We can find no case law to support any other interpretation. For example, in *Marple-Newtown School District v. Raphael N.*,[27] the court briefly concluded that there was no reason to disturb the Panel's ruling that a District's continual communication in English to a non-English speaking parent constituted behavior (specifically, withholding information) that prevented the parent from exercising the right to file for due process. The Raphael case is inapposite because the district in that case continually prevented Raphael's parent from any knowledge of his/her child's problems and functioning. In the current case, the Parents enjoyed full access to information.

This Exception is dismissed.

ORDER

AND NOW, this 7th day of November 2007, the Order of the Hearing Officer is affirmed in its entirety. The Exceptions of the Parents are dismissed.

Specifically, Parents are not entitled to any relief for the due process hearing request filed May 1, 2007.

In accordance with 22 PA Code § 14.162 (o) the parties are advised that this Order may be appealed to the Commonwealth Court of Pennsylvania or the appropriate federal district court.

James K. McAfee, Ph.D.
for the Appeals Review Panel
Mailing Date: November 7, 2007

Footnote

1 F.F. 1. Throughout this decision, FF refers to a Finding of Fact in the Hearing Officer's Final Decision, N.T. refers to the transcript, H.O. refers to a Hearing Officer exhibit, P. refers to a parent exhibit, and S. refers to a District exhibit

2 FF 2

3 S-59

4 S-31, The date is incorrectly identified as June 2000 by the Hearing Officer

5 P-7

6 S-2, 7, 12, 23; P-8

7 S-14, 15, 16, 17.

8 N.T. 10-14. We note that the District and the parents agreed to address these two issues first before unidentified remaining issues. However, the Hearing Officer, in her Final Decision on pages 2 and 3, stated

"The two interim orders were not intended to be final orders. It has been expected that the remaining testimony and other evidence would be presented at the hearings scheduled for September 10 and 11, 2007. On September 7, 2007 the parties reported that the remaining issues had been resolved and requested a brief telephone conference. During this September 10 conference, the parties requested that the record be closed and that the Hearing Officer issue findings of fact and conclusions of law in support of the interim orders. Hence this decision.

9 H.O. 8

10 20 U.S.C. §1400 et seq

11 H.O. 20

12 62 F.2d 520 (3d Cir. 1995)

13 *Id* at 529

14 34 CFR § 300.122

15 H.O. Second Interim Order @ 12.

16 22 Pa. Code§ 4.52

17 See for example *Oberti V. Bd of Educ.* 995 F. 2d 1204 (3d Cir. 1997)

18 H.O. Second Interim Decision @ 13

19 *In re Educational Assignment of E.H*, Special Education Opinion 1838 (2007) (citing 20 U.S.C. § 1415(f)(3)(c)

20 *Id.*

21 Cf. L.E. v. Ramsey Bd. Of Educ., 435 F3d 384, 44 IDELR 269 (3d Cir. 2006)

22 Our decision in *In re the Educational Assignment of D.G.*, Special Education Opinion 1847 (2007) is consistent with this interpretation. In that case, the hearing was conducted in 2007, but the Panel did not apply the IDEA 2004 statute of limitations because the parents' due process request was filed before July 1, 2005, the date that IDEA 2004 went into effect.

23 Case law prior to IDEA 2004 is entirely distinguishable because Congress had not yet enacted an explicit limitations period for filing for due process, whereas in doing so it had the opportunity to consider the various potential exceptions.

24 H.O. Second Interim Order @3-5

25 In Fact from 1997-2004 Student's standard scores on subtests remained constant or increased on three subtests- Math Reasoning, Numerical Operations and Reading Comprehension and decreased slightly on two- Spelling and Written Expression- See S-23 and S-52.

26 N.T. 371-375

27 *Marple Newtown School District v Raphael N*, 2007 U.S. Dist. Lexis 62494 (E.D. Pa 2007)

DECISION

Due Process Hearing for Sloven I
ODR File No. 7632/06-07 LS

Date of Birth:
Dates of Hearing: June 22, July 25 and 26, 2007 – Closed Hearing

Parties to the Hearing:

Mr. & Mrs. Mark (Parents)
Warrington, PA 18976

Representative:
Heidi B. Konkler-Goldsmith, Esq.
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Central Bucks School District
16 Weldon Drive
Doylestown, PA 18901

Scott H. Wolpert, Esq.
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Hearing Officer: Debra K. Wallet, Esq.
Record Closed: September 10, 2007
Date of Decision: September 25, 2007

BACKGROUND:

Parents, on behalf of Student who has since graduated from high school with a diploma, initiated a due process hearing by filing a May 1, 2007 request seeking compensatory education for the period from Student's 1997-1998 school year to the present for the School District's alleged failure to provide a free appropriate public education (hereinafter FAPE]. While in school, Student was identified as having learning disabilities, particularly in reading and language arts.

This Hearing Officer previously entered an Interim Order dated July 23, 2007 (Exhibit HO 8) determining that the Parents, not the School District, bears the burden of proof on the statute of limitations issues and holding that the "continuing violations" doctrine did not apply to this matter. The Hearing Officer took testimony and other evidence on June 22, July 25 and 26, 2007 relevant to the statute of limitations and any exceptions thereto, as well as the graduation issue. After receiving briefs on the legal issues of whether or not an exception to the statute of limitations has been established by the Parents and whether or not Student was "improperly graduated" from the School District, this Hearing Officer entered a Second Interim Order (HO 20) resolving these two issues.

These two interim orders were not intended to be final orders. It had been expected that the remaining testimony and other evidence would be presented at the hearings scheduled for September 10 and 11, 2007. On September 7, 2007, the parties reported that the remaining issues had been "resolved" and requested a brief telephone conference. During this September 10

conference, the parties requested that the record be closed and that the Hearing Officer issue findings of fact and conclusions of law in support of the interim orders. Hence this decision.

FINDINGS OF FACT:
Background

1. Student is a 20-year-old (D.O.B. 1/20/87) whose Parents initiated a due process hearing by filing a May 1, 2007 request.

2. Student has learning disabilities in a number of areas but most particularly in reading and language arts. *(See, e.g.*, P-9; N.T. 198).

3. Parents seek compensatory education for the period from Student's 1997-1998 school year to the present for the School District's alleged failure to provide FAPE. (HO 14).

4. The School District filed a timely response to the due process request raising a number of affirmative defenses including, *inter alia*, that the claims are barred by the applicable statute of limitations and are barred as a result of Student's graduation from high school. (HO 15).

5. The Hearing Officer took testimony and other evidence on June 22, July 25, and July 26, 2007 relevant to the statute of limitations and any exceptions thereto, as well as the graduation issue.

6. The following exhibits were admitted: P-1 through P-3; P-5 through P-23; S-1 through S-80. (N.T.

182). A package of documents marked P-24 was stipulated to be "authentic documents." (N.T. 541). During the hearings, the Hearing Officer marked and introduced exhibits HO 1 through HO 15. Subsequent to the July 26, 2007 hearing, the Hearing Officer marked and admitted the following on her own motion:

> HO 16 - Motion in Support of Parents' Claims That the Statute of Limitations in IDEA is not Applicable and Steven was Improperly Graduated from the District;
>
> HO 17 - Respondent, Central Bucks School District's Memorandum in Opposition to Petitioners' Claims Regarding the Statute of Limitations and Graduation Issues;
>
> HO 18 - Parents' Response to School District's Brief in Opposition to Parents' Claims Regarding the Statute of Limitations and Graduation Issues;
>
> HO 19 - Reply Memorandum of Law of Central Bucks School District in Opposition to Petitioners' Claims that the IDEA Statute of Limitations is not Applicable and That Student was Improperly Graduated from the District;
>
> HO 20 - Second Interim Order with Respect to Parents' Motion: (1) That the Statute of Limitations is not Applicable and (2) That Student was Improperly Graduated.

7. Five witnesses testified at hearing; me guidance counselor who monitored Student's graduation credits;

twelfth grade teacher; tenth through twelfth grade learning support teacher and IEP case manager; Mother; and me Supervisor of Special Education.

Educational Program

8. Parents wrote a letter to the School District dated July 28, 1997 in which Parents contended that Student "can't read" and that he "cannot write a paragraph." (S-59, PP. 2-3).

9. The IEP team determined in June 2000 that Extended School Year services were required for Student. The Wilson Reading Program (16 hours) was provided to him during the summer of 2000. (S-30, p.4).

10. The goal for this Extended School Year was "to improve reading skills to a third-grade level." (S-31, p.1).

11. The May 17, 2001 IEP listed Student's strengths as auditory and mathematical skills. His needs are written language skills, reading comprehension, organizational and time management skills, and assignment completion. This IEP listed reading levels significantly below grade level. (S-27, p. 3).

12. The School District consistently reported railing grades over the course of Student's education and reported achievement scores indicating borderline functioning in reading, writing, and mathematics. (S-2; S-7; S-12; S-23; P-8; N.T. 409).

13. The School District told Student's parents during the tenth, eleventh, and twelfth grade school

years that Student was making educational progress. (N.T. 206, 226, 302).

14. The Hearing Officer accepts as true the opinion of Maureen Riley, English and study skills resource room teacher who supervised Student's IEP from 2002 to 2005, that Student made progress every year. (N.T. 196, 226).

15. This record contains no statements that Student's reading problems had been resolved. To the contrary, the School District continually told Parents that Student was struggling academically. (N.T. 408).

16. Mother testified credibly that while she believed there was some educational progress, she was concerned about how much progress Student was making. (N.T. 417).

17. Mother testified that the School District was not misrepresenting anything. She simply questioned the level of achievement reported by the School District. (N.T. 417).

18. Parents knew that Student did not pass the PSSA in eleventh grade and that he was not proficient with respect to basic skills. (N.T. 391).

19. The December 2004 IEP referenced an evaluation by the certified school psychologist done in August 2004. This evaluation showed a full scale IQ of 89 with a difference between non-verbal and verbal reasoning abilities. The IEP reported, based on this evaluation, that "achievement in the areas of reading and written expression is significantly discrepant from

his ability. His reading comprehension and sight vocabulary skills were well below the average range." (S-12, pp. 4-5).

20. The December 2004 JEP reported that Student's "absences are a major part of his low grades in class." (S-12, p. 4).

21. Student had only four unexcused absences during his ninth, tenth, and eleventh grade school years. He had 59.5 excused absences but only 15.5 unexcused absences during the twelfth grade year. (S-2).

22. Based upon Mother's testimony, the Hearing Officer finds that the psychologist called Mother to explain this 2004 reevaluation and mailed Mother the full report. (N.T. 405-407).

23. By at least February 2005, Parents knew that their son was not proficient in basic skills. (S-7; N.T. 390-391).

24. At least by December 21, 2004, Mother knew that Student was making little educational progress because the certified school psychologist's re-evaluation conclusions were contained in the December 2004 IEP. Mother was in attendance at this meeting. (S-12 pp. 3-5, S-23).

25. Mother received many procedural safeguard notices between 1997 and June 2005. (N.T. 419-424).

26. The School District made no "specific misrepresentation" that it had resolved Student's problems in reading and writing.

27. Based upon the testimony of Student's IEP case manager, Mrs. Maureen Riley, educational records such as progress reports on IEP goals and objectives were prepared and regularly mailed to Student's mother. (N.T. 274-276).

28. The School District never denied Mother any documents. (N.T. 376-377).

29. The School District did not withhold information from the Parent that was required to be provided by IDEIA.

30. Parents have failed to establish either exception to the two-year limitations period contained in IDEIA.

Graduation

31. The IDEIA did not become effective until July 1, 2005, after Student had graduated on June 17, 2005. (S-8; P-1).

32. Based upon the testimony of Michele McGroggan, eleventh and twelfth grade guidance counselor, Student had all of the required credits in English, social studies, science, math, arts and humanities, electives, gym, and technology. Student had done both a ninth grade assessment and an eleventh grade graduation project. In her opinion, he satisfied the requirements to receive a regular high school diploma. (N.T. 88).

33. Student received the requisite number of course credits in English, science and social studies to graduate with a regular high school diploma. (S-2; N.T. 43-50, 88).

34. Student was graduated based, in part, upon a portfolio review process. (N.T. 588-591; 583-584).

35. The School District found Student's portfolio containing specific written work by Student to be satisfactory and to comply with its local assessment system adopted pursuant to the Pennsylvania Code, 22 Pa. Code §4.52. (S-3; N.T. 601).

36. The School. District requires that two individuals evaluate the Student's portfolio. In addition the teacher providing the portfolio assignment, Mary Renner also reviewed the portfolio. (N.T. 53-55).

37. By June 2005, Student had demonstrated skills necessary for post-graduate life. (N.T. 204).

38. Mother had ample notice that her son was slated to graduate. (N.T. 387).

39. Mother was advised at IEP meetings in both the eleventh and twelfth grade years that Student could remain at school after the conclusion of his twelfth grade year, instead of graduating, (N.T. 389-390).

40. Parents knew that Student was receiving credit for his resource room classes throughout his high school career. (N.T. 365-367).

41. Parents were sent a May 20, 2005 letter advising them of the June 17, 2005 graduation. Any senior not planning, to attend the graduation ceremony was to advise the principal in writing on or before May 31. (S-6).

42. The School District sent a Notice of Recommended Educational Placement (NOREP) in June 2005 indicating the graduation and the discontinuation of specially designed instruction. (S-5).

43. There is no indication in the written records or by testimony that Parents either approved or disapproved this NOREP. - (S-5, p. 3).

44. Student properly received a regular education diploma on June 17, 2005.

45. Based upon a January 20, 1987 date of birth, Student turned age 18 on January 20, 2005, If he filed a due process request within two years of his eighteenth birthday, such a request would have been required on or before January 20, 2007.

46. Even if the concept of minority tolling were applicable to IDEIA, minority tolling would provide no relief in this case.

CONCLUSIONS OF LAW

1. The Hearing Officer has jurisdiction over the provision of a Free Appropriate Public Education [FARE] to Student.

2. This case has been brought under the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §1400 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. §793.

3. The limitations period contained in IDEIA is applicable to this due process request filed May 1, 2007.

4. Parents bear the burden of proving that they have filed a request for an impartial due process hearing within the limitations period contained hi IDEIA.

5. Having failed to present evidence of a specific misrepresentation by the local educational agency that it had resolved the problem forming the basis of the complaint or the local educational agency's withholding of information from the Parent, Parents were required to request an impartial due process hearing within two years of the date the Parents knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. §1415(f)(3)(C)(D).

6. A two-year statute of limitations is applicable to Section 504. *Zankel v. Temple University*, 2006 U.S. Dist. LEXIS 22473; *Barclay v. Amtrak*, 343 F. Supp. 2d 429, 433 (E.D.Pa. 2004) (quoting *Saylor v. Ridge*, *989* F. Supp. 680, 686 .(E.D. Pa. 1998*)*

7. The continuing violations doctrine does not apply to due process hearing requests brought under the IDEIA.

8. The continuing violations doctrine does not apply to Section 504 claims.

9. Parents bear the burden of establishing that Student was not entitled to receive a regular high school diploma.

10. Neither IDEIA nor Section 504 permit the filing of a claim by Student after Student reaches the age of majority, age 18 in Pennsylvania.

DISCUSSION

The Hearing Officer incorporates herein the Interim Order and Second Interim Order in their entirety. These interim orders are attached for the convenience of the parties.

ORDER

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Parents are not entitled to any relief for the due process hearing request filed May 1, 2007.

Date: September 25, 2007

Debra K. Wallet, Esq.
Hearing-Officer
24 North 32nd Street
Camp Hill, PA 17011
(717) 737-1300

PENNSYLVANIA SPECIAL EDUCATION DUE PROCESS HEARING

ODR No. 7632/06-07 LS

In re STEVEN I.

a student in the central Bucks School District

INTERIM ORDER WITH RESPECT TO: (1) PARENTS' MOTION TO PLACE THE BURDEN OF PROOF ON THE SCHOOL DISTRICT WTTH RESPECT TO THE STATUTE OF LIMITATIONS AND (2) APPLICABILITY OF THE CONTINUING VIOLATIONS DOCTRINE

Introduction

Parents, on behalf of Student who has since graduated from high school with a diploma, initiated a due process hearing by filing a May 1, 2007 request seeking compensatory education for the period from Student's 1997-1998 school year to the present for the School District's alleged failure to provide a free appropriate public education (hereinafter FAPE). While in school, Student was identified as having learning disabilities in reading, math, and language arts.

The School District filed a timely response to the due process request including the affirmative defense that the statute of limitations bars any claims prior to May 1, 2005. In response, the Parents request that this Hearing Officer determine who bears the burden of proving the facts necessary to establish the relevant limitations period. In addition, the parties have briefed

the "pure legal issue" of whether or not the continuing violations doctrine should be applicable to cases under The Individuals with Disabilities Education Improvement Act of 2004 [hereinafter IDEIA], 20 U.S.C. §1400 *et seq.* or Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. §793 [hereinafter Section 504].
This Interim Order is not intended to be a .definitive ruling on all of the statute of limitations issues raised in this case. The Hearing Officer has agreed to hear any relevant testimony and other evidence related to when the parent "knew or should have known about the alleged action that forms the basis of the complaint" or the exceptions in the IDEIA concerning specific misrepresentations or withholding of information. *See* 20 U.S.C. §1415(f)(3)(C)and(D).

Burden of Proof With Respect to the Statute of Limitations

In *Schaffer v. Weast*, 126 S. Ct. 528 (2005), our United States Supreme Court established that the party seeking relief bears the burden of persuasion under IDEIA. In accordance with *Schaffer*, Parents will hear the burden of going forward to establish their entitlement to compensatory education or any other relief warranted for violations of IDEIA. Parents now assert that because the statute of limitations is an affirmative defense, the burden of proof on this issue (as opposed to persuasion) should fall upon the Defendant, citing *Richard B. Roush, Inc., Profit Sharing Plan v. New England Mutual Life Insurance Co.*, 311 F.3d 581, 585 (3d. Cir. 2002).

Specifically, Parents contend that it is the School District's burden to prove "the start date of the statute

of limitations." The Hearing Officer rejects this argument. The legal analysis concerns the following statutory provision:

> (C) Timeline for requesting hearing
>
> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.
>
> (D) Exceptions to the timeline
>
> The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to-
>
> (i) Specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
>
> (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.

Section 1415 of the IDEIA, 20 U.S.C. §1415(f)(3)(C) and (D).

It should be obvious from the language of IDEIA that if Parent wishes to assert exceptions to the timeline under subsection (D), the burden would clearly fall upon the Parent to plead and prove the misrepresentation or the withholding of information. *See, e.g., Velez v. QVC, Inc.*, 227 F. Supp. 2d 384(E.D. Pa. 2002). Similarly, it is incumbent upon the Parents to plead specific incidents of violations of IDEIA such that the due process hearing request has been made within two years of the date of those incidents. The Hearing Officer finds that it would turn the statute on its head to impose upon the School District the requirement to show a lawful start date when it must be the Parent who "knew or should have known about the alleged action."

The reliance on *Roush, supra*, is misplaced. The Third Circuit Court of Appeals in *Roush* placed the burden of proof on the party moving for summary judgment with respect to a statute of limitations issue. As the moving party, the defendant was required to prove that actual knowledge of a breach of fiduciary duty occurred more than three years before the action was filed and that because of this the action was necessarily barred by the statute of limitations. This is not the same as requiring the School District to show a "start date"[1] for a timely due process request

.

The Hearing Officer agrees with the School District that the burden of pleading and proving facts to establish that a timely due process request has been brought here must fall squarely upon the parents who

have made the due process request. The motion to place the burden on the School District is denied.

Applicability of the continuing violations doctrine on the statute of limitations

The Parties agree that the United States Court of Appeals for the Third Circuit has not yet ruled on whether the continuing violations doctrine applies to actions brought under the IDEIA, its predecessor the Individuals with Disabilities Education Act [hereinafter IDEA], or Section 504. The continuing violations doctrine refers to the concept that when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period. In such instance, a court may grant relief for the earlier related acts that would otherwise be time barred. *Brenner v. Local 514*, 927 F.2d 1283, 1295 (3d Cir. 1991), citing *Keystone Ins. Co. v. Houghton*, 863 F2d 1125, 1129 (3d Cir. 1988).

The question, as this Hearing Officer sees it, is whether or not those cases applying the continuing violations doctrine to IDEA (before IDEIA added specific timeliness language) should now be applicable to cases brought after the effective date of IDEIA on July 1, 2005. If, as the School District contends, the continuing violations doctrine is in the nature of an Exception to a given statute of limitations, then it is difficult to reconcile that IDBIA included two specific exceptions but did not incorporate the concepts of continuing violations. On the other hand, if it is more in the nature of an equitable consideration, then these concepts could still apply to IDEIA.

Frankly, *Robert R. v. Marple Newtown School District*, 2005 U.S. Dist. LEXIS 27093, much debated by the parties here is not helpful in this decision. At best, any analysis about "ongoing" claims in *Robert R.* must be considered dicta because the case involved IDEA, not the IDBIA. Moreover, the dicta in *Robert R.* is neither analytical nor persuasive.

This Hearing Officer is more persuaded by the analysis of the Wisconsin Court in *Vandenberg v. Appleton Area School District*, 252 F. Supp. 2d 786, 789-93 (E.D. Wis 2003) writing about IDEA as well but explaining that a "student's education, if defectives, fits all too easily into the category of a 'continuing violation' and thus the application of an exception would swallow the rule itself. Under Plaintiffs' theory, a parent could, upon student's graduation from eighth grade, seek a due process hearing to remedy the entire eight years of inadequate education merely because the entire education was a continuing violation." *Id.* at 793.

Congress addressed the problem of a lack of a specific limitation on claims under IDEA and imposed a two-year timeline in IDEIA. A state is permitted to impose a different time limitation, but Pennsylvania does not have one. The Congressional mandate is not without two specific exceptions for misrepresentation or the withholding of information. Yet, allowing a continuing violation doctrine would make it quite easy to defeat the very intention of a two-year limitation. This Hearing Officer believes that application of a continuing violations doctrine would, indeed, eviscerate the limitations period itself. Consequently, as a matter of law, the continuing violations doctrine will not be applied.

The analysis with respect to Section 504 is more difficult. As a nondiscrimination statute, at first blush, it is more akin to the employment discrimination statutes in which the continuing violations doctrine is applied by the Third Circuit Court of Appeals and most other circuits. *See, e.g., West v. Philadelphia Electric Co.*, 45 F.3d 744 (3d Cir. 1995) and the cases cited therein.

Courts have held that a two-year statute of limitations for personal injury claims is applicable to Section 504. *Zankel v. Temple University*, 2006 U.S. Dist. LEXIS 22473; *Barclay v. Amtrak*, 343 F. Supp. 2d 429, 433 (E.D. Pa. 2004) (quoting *Saylor v. Ridge*, 989 F. Supp. 680, 686 (E.D. Pa. 1998).

Parents allege that the Eastern District of Pennsylvania has applied the continuing violations doctrine to Section 504 in *Sutton v. West Chester Area School District*, 2004 U.S. Dist. LEXIS 7967. The language is not precise, but upon close reading, this case does not apply continuing violations to claims under Section 504 but only to pleaded claims of abuse of process, which it appears to consider claims under common law. Even if it had directly applied the doctrine to Section 504, the Court gives no analysis or reasoning regarding the applicability of the continuing violations doctrine to Section 504.

In the absence of any case law and because it would make little sense to deny relief under IDEIA but grant that same relief under Section 504, the continuing violations theory will not be applied to Section 504. By the same reasoning, the application of a continuing violations doctrine in an education context where

education is, by nature, a continuous process would eviscerate the statute of limitations.

Debra K. Wallet,
Debra K. Wallet, Esq.
Date: July 23, 2007
Hearing Officer

Footnote

[1]Parents also cite *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3d Cir. 2007) as support for their statement that "proof of the expiration of the statute of limitations clearly requires proof of the lawful start date for the limitations period." While the Hearing Officer generally agrees with the statement, she can find nothing in this case which even remotely addresses this issue.

PENNSYLVANIA SPECIAL EDUCATION DUE PROCESS HEARING

ODR No. 7632/06-07 LS

In re STEVEN I.

a student in the central Bucks School District

SECOND INTERM ORDER WITH RESPECT TO PARENTS' MOTION: (1) THAT THE STATUTE OF LIMITATIONS IS NOT APPLICABLE AND (2) THAT STUDENT WAS IMPROPERLY GRADUATED

Introduction

Parents, on behalf of Student who has since graduated from high school with a regular education diploma, initiated a due process hearing by filing a May 1, 2007 request seeking compensatory education for the period from Student's 1997-1998 school year to the present for the School District's alleged failure to provide a free appropriate public education (hereinafter FAPE). While in school, Student was identified as having learning disabilities in reading, math, and language arts. The School District filed a timely response to the due process request including the affirmative defense that the statute of limitations bars any claims prior to May 1, 2005, two years prior to the filing of the due process request.

This Hearing Officer previously entered an Interim Order dated July 23, 2007 (Exhibit HO 8) determining

that the Parents, not the School District, bears the burden of proof on the statute of limitations issues and holding that the "continuing violations" doctrine did not apply to this matter. The Hearing Officer took testimony and other evidence on June 22, July 25 and 26, 2007 relevant to the statute of limitations and any exceptions thereto, as well as the graduation issue. The parties have fully briefed the legal issues of whether or not an exception to the statute of limitations has been .established by the Parents and whether or not Student was "improperly graduated" from the School District.
This second Interim Order is not intended to be a definitive ruling on all of the issues in this case under The Individuals with Disabilities Education Improvement Act of 2004 [hereinafter IDEIA], 20 U.S..C. §1400 *et seq.* or Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. §793 [hereinafter Section 504]. However, the parties have had a full opportunity to present any relevant testimony, documentary or other evidence related to the exceptions concerning specific misrepresentations or the withholding of information specifically set forth in 20 U.S.C. §1415(f)(3)(C) and (D). In order to set the parameters for the balance of the testimony in this case, the Hearing Officer issues this second Interim Order.

Applicability of Exceptions to the Statute of Limitations

The legal analysis concerns the following-statutory provision:

(C) Timeline for requesting hearing

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has as explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.
>
> (D) Exceptions to the timeline
>
> The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to-
>
> (i) Specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
>
> (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.

Section 1415 of the IDEIA, 20 U.S.C. §1415(f)(3)(C) and (D).

As decided by the first Interim Order, the burden of asserting and proving exceptions to the timeline under subsection (D) falls upon the Parent. *See, e.g., Velez v. QVC, Inc.*, 227 F. Supp. 2d 384 (E.D. Pa. 2002). This Hearing Officer will address individually the two broad exceptions contained in IDEIA. Parents generally argue that they are entitled to a remedy because the School District repeatedly failed to address Student's learning disabilities and because Student failed to make

meaningful educational progress and may, in some subject areas, have regressed during his school years.

Specific Misrepresentations

Parents contend, further, that specific misrepresentations consisted of the following:

- When Steven's parent expressed concerns about Steven's progress, the District advised it was working on these concerns and going to fix any problems, and Steven's parents believed their concerns were being addressed. N.T. 306-307, 459. Steven's parent agreed that she believed the District was responding to and addressing her concerns. N.T. 380, 459. The District admitted that even though Steven's parents were under the belief that concerns raised by parents were going to be addressed, Steven received many failing grades over the course of his educational career and his achievement scores indicated borderline functioning in reading, writing, and math. S-23; N.T. 306.

- When Steven completed Kindergarten in 1993, he was functioning academically below a readiness level. S-71. By his fourth grade school year in 1997, Steven was functioning at a primer/low first grade level in reading and first grade level in language arts. S-66. Indeed, Steven demonstrated regression in leading .and language arts over the 1994-1995 and 1996-1997 school years (second

through fourth grades). S-60; S-66. Specifically in 1995. Steven's CER represented he was functioning on the first grade level in reading and beginning second grade in language arts, but by 1997, his CER demonstrated he regressed to the primer/low first grade level in reading and first grade level in language arts. S-60; S-66. Incredibly, in a letter to Steven's parents, dated August 14, 1997, the District specifically misrepresented to Steven's parents that Steven was making academic progress. S-57. In response to parents' July 28 1997 letter expressing concerns about Steven's lack of progress, the District's Supervisor of Special Education stated "In looking back over Steven's IEPs, I have noted he has made progress in many, many areas..." S-57.

- The District also responded to parents' July 28, 1997 letter by moving Steven to another District elementary school, and Steven's parents were led to believe that the problem was corrected. N.T. 452-453, 464.

- Despite Steven's demonstrated regression over his 1994-1995 to his 1996-1997 school years (second to fourth grades) indicated in the District's CERs (April 24, 1995 CER and April 4, 1997 CER), Steven's fourth grade, progress report indicated Steves was making

steady progress in reading. S-60; S-66; P-16.

By November of 1998, Steven's parents again expressed their concern to the District about Steven's lack of progress. However, once again, the District's Supervisor of Special Education responded in a letter to Steven's parents dated December 4, 1998. "I believe Titus Elementary and the school district have done more than provide an appropriate educational program for Steven. He is making educational progress and he seems to be happy with his schooling at Titus." S-40; S-41. The District's response to parental concern reflected another specific misrepresentation to Steven's parents. At the time the District claimed Steven was making progress, Steven was actually functioning at the pre-primer level in reading which was six years behind his grade level. S-43; S-52. What is more disturbing is that in October, 1997, one year earlier, Steven was functioning four years behind his actual grade level placement in reading, reading comprehension, and spelling, and three years below grade level in written expression. S-52. Thus, Steven actually regressed two years, and the gap between his grade level and achievement levels continued to dramatically widen from Steven's fifth grade school year in 1997 to his sixth grade school year is 1998 while

the District astonishingly maintained Steven was making educational progress. S-40; S-43; S-52.

- Steven's mother testified that, during the 1998-1999 to the 2000-2001 school years, the District specifically misrepresented on at least two occasions that Steven reading at a higher level than he actually was, based on a curriculum based assessment. N.T. 435-436.

- In the April 30, 2001 ER, the District *continued to maintain* Steven was *making* educational progress, stating "Steven has demonstrated satisfactory performance in school [and] Steven continued to make steady progress in the Wilson Reading Program." S-28. This statement made to Steven's parents represented yet another specific misrepresentation on behalf of the District. Steven was actually functioning at least four years behind his actual grade level placement in reading at the time this representation was made. S-27.

- The District's May 17, 2001 IEP unbelievably contradicted itself in the present education levels by indicating Steven's reading level of at least four years below grade level, but then specifically misrepresented to Steven's parents that "he is making satisfactory progress." S-27.

- The District made another specific misrepresentation to Steven's parents in the present education levels of the May 19, 2003 IEP, stating "Steven has been demonstrating satisfactory performance in his classes." S-20. Steven's final grades for his 2002-2003 school year, however, consisted of two F's, three D minuses, two D's, and two D pluses, which did not reflect "satisfactory performance in his classes." S-2.

- Over Steven's elementary, middle, and high school years, the District repeatedly made statements that Steven was making academic progress when parents expressed their concerns regarding Steven's progress. N.T.465.

- The District continually made specific misrepresentations to parents that Steven was making educational progress at IEP meetings, in report cards, and in progress reports over the years. N.T. 417-418, 437-439.

- The District admitted that Steven's parents were told during his tenth, eleventh, and twelfth grade school years that Steven was making educational progress. N.T. 206, 226, 302.

- When Steven's mother attempted to address the results of the District's

> August 2004 ER which clearly indicated Steven's failure to make educational progress, the District advised her that she was misinterpreting the results of the report. S-23; N.T. 459-460, 469, 471-472.

Because of the statutory language, Parents must show that they were "prevented from requesting the hearing" because of either misrepresentations or a withholding of information by the School District. Subpart (i) requires both a "specific misrepresentation" and a showing that the misrepresentation resolved "fee problem forming the basis of the complaint." The Hearing Officer has carefully considered each of these 13 bullet points. Not one of these bullet statements (even if assumed true) meets the statutory requirement. There is no doubt that the School District told the Parents that the Student was making educational progress. Parents may now dispute this progress, but such reporting cannot reasonably be construed as a specific misrepresentation that any "problem was resolved."

The Hearing Officer must agree with the School District that many communications between the school and the Parent demonstrated that Student had ongoing educational struggles, particularly in the area of reading. Parent admitted that she received these communications and she knew that Student was struggling academically. (N.T. 408). None of these communications would have "prevented" the Parent from requesting a due process hearing. 20 U.S.C. §1415(f)(3)(D).

Nearly all of the Parents' bullet statements attempt to establish that Student failed to make *any* educational progress. However, Mother credibly testified that while she believed there was *some* educational progress, she was concerned with how much Student was making. (N.T. 417). Further, she testified that she did not think that the School District was intentionally misrepresenting anything; she knew that her son was making progress, but she questioned the level of achievement reported by the School District. (N.T. 417).

If Mother repeatedly questioned the progress made by her son, she has given this Hearing Officer no reasons why she could not have requested a due process hearing at the time she was questioning this progress. This case is not at all like the situation in *Lauren P.v. Wissahickon School District*, 2007 U.S. Dist. LEXIS 44945, in which the Court explained that a school district may not rely upon parental approval to disclaim its responsibilities because parents may not be "sufficiently sophisticated" to deal with complicated educational matters. When analyzing a failure to file a timely claim, the words of the statute limit the reasons sufficient to excuse a failure to file. The statute of limitations applies to both the unsophisticated and the sophisticated parent. Mother "here must show reasons which "prevented" her from requesting a due process hearing.

The Hearing Officer is persuaded by the fact that the School District consistently reported failing grades over the course of Student's education and certainly reported achievement scores indicating borderline functioning in reading, writing, and mathematics. (S-2;

S-7; S-12; S-23; P-8; N.T. 409). Parents knew that Student did not pass the PSSA in 11th grade and that he was not proficient with respect to basic skills. (N.T. 391). There is no doubt that the School District may have made comments relating to the fact that it was working on these problems (*see e.g.* N.T. 305-307), but there is absolutely no testimony of record suggesting that the School District had "resolved the problem."

The Hearing Officer is further persuaded by Parents' letter dated July 28, 1997 in which Parent contends that Student "can't read" and that he "cannot write a paragraph" and has an ineffective teacher. (S-59, pp. 2-3). It is difficult, if not impossible, to ignore the July 28, 1997 letter as a date on which the Parent "knew or should have known about" the School District's failure to provide FAPE. Parents' counter to this letter is that when Student was moved to another school Parents believed that the "problem was corrected." (Petitioner's Motion, p. 6). The "problem is allegedly ineffective teaching and the denial of an appropriate educational opportunity. The Hearing Officer simply cannot accept that the Parent had been led to believe that the "problem" had been resolved or, more precisely, that there were any misrepresentations suggesting that the "problem" had been resolved. If the Parents knew or should have known that their son was making little or so educational progress, they had the statutory responsibility to file a timely request for due process. Mother acknowledged having received many procedural safeguard notices between 1997 and June 2005. (N.T. 419-424).

While the Hearing Officer may be sympathetic to the plight of this Student, she is unable and unwilling to

bend the statutory language to allow for an exception based on "specific misrepresentations." The exceptions contained in IDEIA must be strictly, not broadly, construed. *See Givens v. Kyler*, 2004 U.S. Dist. LEXIS 20325.

Withholding of Information

Parents contend that even if the Hearing Officer fails to find specific misrepresentations, then the School District withheld information that was required to be provided to the Parents sufficient to satisfy subpart (ii) of the statute. In support of this argument, they give the following examples of incidents in which the District withheld necessary information;

- While Steven demonstrated regression in reading and language arts over the 1994-1995 and 1996-1997 school years, the District inaccurately maintained Steven was making satisfactory academic progress in a letter to his parents from the District's Supervisor of Special Education dated August 14, 1997, S-40, S-60 S-66. Thus, the District withheld accurate information from Steven's parents regarding Steven's lack of progress toward his annual IEP goals for reading and language arts during that time period. S-50; S-53; S-63; S-65; S-67.

- In response to parental concern in December of 1998, the District's Supervisor of Special Education inaccurately reported to Steven's parents

that Steven was making educational progress when, in fact, Steven was functioning four years below grade level in reading. S-40; S-41; S-43. The District, yet again, withheld information with respect to Steven's progress that it was required to provide to parents.

- None of the District's IEPs for Steven over the years, with the exception of the May 10, 2002 and May 19, 2003 IEPs, which are nevertheless woefully inadequate, included any information regarding Steven's progress on his annual IEP goals. S-12; S-19; S-20; S-24; S-25; S-27; S-32; S-35; S-43; S-50; S-53; S-63; S-65; S-67.

- The District's IEP progress Sports provided to Steven's parents during his high school years did not accurately reflect Steven's lack of progress, whereby the District withheld information from Steven's parents it was required to provide. The District testified that the minimal and inaccurate IEP progress reports included in the May 19, 2003 IEP are representative of the types of progress reports Steven's parents received during high school S-19; N.T. 307.

- The District admitted that if withheld information pertaining to Steven's expected rate of progress in all of the

> Districts ERs, IEPs, and progress reports developed for Steven over the years. N.T. 553.[2]

Again, the Hearing Officer has carefully considered each of these bullets. These arguments also fall short of the proof of "withholding of information" which would excuse a late request for a due process hearing. Parent testified that the School District never denied her any documents. (N.T. 376-377). The Student's IEP case manager, Mrs. Riley, stated that educational records such as progress reports on IEP goals and objectives were prepared and regularly mailed to Student's mother. (N.T. 274-276). The arguments made by Parents that the School District "admitted" that it withheld information is simply not supported by the testimony of record at N.T. 553.

Another piece of compelling testimony came from Mother. She was aware of a re-evaluation conducted by the District when a certified psychologist called her to explain that his 2004 report identified that Student's achievement in reading and written expression was significantly discrepant from his ability, that his reading comprehension and sight vocabulary skills were well below the average range, and that he read very slowly and required much more additional time to complete grade level reading assignments. He mailed her the full report. All of this information was also referenced in the December 2004 IEP. (S-12, pp. 4-5; S-23; N.T. 405-407). According to Mother, she knew her son was struggling in the 12th grade. (N.T. 408). This is not the testimony of a parent who was prevented from requesting a hearing because of the withholding of information.

Parents make the novel argument that the School District "withheld" information advising Parent of the statute of limitations. The problem with this argument is that the IDEIA did not become effective until July 1, 2005, admittedly *after* the Student had already graduated. One must wonder how a school district could have advised a parent of a limitations period during the years before Student's June 2005 graduation when the statute failed to contain any specific limitations period at that time. Had the Parents promptly complained and requested a hearing during those years he was in school, there would be no limitations issue. However, Parents waited to complain and are now subject to a two-year limitations period in effect at the time they finally filed their due process request. It was not in effect at the time Student was in school.[3]

The Parents have failed to show that any "withholding of information" prevented them from making a due process hearing request.

The Statute of Limitations Relative To Section 504 of the Rehabilitation Act

Although Section 504 does not contain a statute of limitations, the federal courts have applied that state statute which is most analogous to the federal claim. In Pennsylvania, courts have held that a two-year statute of limitations for personal injury claims is applicable to Section 504. *Zankel* v. *Temple University*, 2006 U.S. Dist LEXIS 22473; *Barclay v. Amtrak*, 343 F. Supp. 2d 429, 433 (E.D. Pa. 2004) (quoting *Saylor v. Ridge*, 989 F. Supp. 680, 686 (E.D. Pa. 1998). The Hearing Officer specifically rejects any legal argument that a period longer than two years should be recognized to file a

claim of discrimination under Section 504. This holding includes any argument that the minority tolling statute gives Student here a longer period in which to file a claim which is essentially one for relief under the IDEIA. It is the adult parent who is bringing this due process hearing request, not a minor.

"Unlawful" Graduation

The IDEIA requires that a student receive FAPE until the student reaches 21 years of age or, having obtained a regular education high school diploma, is no longer in need of specially designed instruction. 34 C.F.R. §300.122(a)(3)(ii). This Hearing Officer believes that it is the Parent who must "bear the burden of establishing that Student was not entitled to receiver high school diploma. Although Parents attest to shift the burden to the School District, the Hearing Officer maintains that the burden is properly placed upon the Parents who are the moving party in this due process hearing request.

Parents allege that Student failed to meet either the state or the District graduation requirements in the following respects: (1) Student's absences prevented him from completing the required hours of instruction; (2) the District's alternative local assessment was invalid; and (3) Student failed to receive the requisite number of credits to graduate.

Student's absences prevented him from completing the required hours of instruction.

The flaw in Parents' argument is that it fails to recognize that the overwhelming number of Student's admittedly frequent absences was excused. (*See* S-2),

Student had only four unexcused absences during his ninth, tenth, and eleventh grade school years. He had 59.5 excused absences but only 15.5 unexcused absences during the twelfth grade year. (S-2). It does not appear that these absences violate 22 Pa. Code §11.23 and §11.25, permitting the excusing of compulsory school attendance under certain conditions.

The School District certainly complained about Student's failure to attend school, but the Parents continued to provide excuses for his absences. (S-16 pp.5-6; S-17; S-18; S-19).

***

again, is upon the Parents to show that the School District improperly awarded a regular education diploma.

Underlying the entire argument is the premise that awarding credit for resource room classes is unlawful and inappropriate. However, Parents cite to no legal authority for this proposition and Parents knew that Student was receiving credit for this resource room classes throughout his high school career. (N.T. 365-67). The argument that Student failed to receive the requisite number of credits must be rejected.

Conclusion

Having concluded that the Parents have failed to meet their burden of establishing an exception to the two-year limitations period contained in IDEIA, the Hearing Officer will entertain only those claims arising

after May 1, 2005. Further, the Hearing Officer finds that the Student lawfully graduated on June 17, 2005.

Debra K. Wallet
Debra K. Wallet, Esq.
Date: September 6, 2007
Hearing Officer

Footnotes

[1]These specific allegations are quoted verbatim from the Motion in Support of Parents' Claims That the Statute of Limitations in IDEA is not Applicable and Steven was Improperly Graduated from the District, pp. 5 through 9.

[2]These specific allegations are quoted verbatim from the Motion in Support of Parents' Claims That the Statute of Limitations in IDEA is not Applicable and Steven was Improperly Graduated from the District, pp. 10 through 11.

[3]This Hearing Officer rejects any argument that the limitations period in IDEIA is being applied "retroactively." Having filed a due process request on May 1, 2007, some 22 months after the effective date, this due process request is without question subject to the limitations period in IDEIA.

No. 10-1179
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STEVEN I.; MARK I.; JILL I.,
v.
CENTRAL BUCKS SCHOOL DISTRICT,
Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. Civil No. 2-08-cv-00571). District Judge: Honorable John R. Padova
Present: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., and VANASKIE, Circuit Judges.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellees Jill I., Mark I. and Steven I., having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby

DENIED.
BY THE COURT:
/s/Marjorie O. Rendell, Circuit Judge
Dated: September 15, 2010
MB/cc: Gabrielle C. Sereni, Esq.
Scott H. Wolpert, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPELLATE DOCKET NO. 10-1179
STEVEN L., ET AL. v. CENTRAL BUCKS SCHOOL DISTRICT

ON APPEAL FROM A CIVIL RIGHTS ACTION IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DOCKET NO. 08-0571

PETITION FOR PANEL REHEARING AND REHEARING EN BANC OF APPELLEES

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I. Preliminary Statement

Appellees hereby seek Rehearing En Banc because the three-member panel in this interlocutory appeal held that, although the prior statute had no limitations period, the new time limitation in the amended Individuals with Disabilities Education Act, 20 U.S.C.A. Section 1401 *et seq.* ("IDEA-2004") may be retroactively applied to destroy claims existing prior to the effective date of the amended Act (July 1, 2005). This decision was contrary to binding Supreme Court decisions in Landgraf v. USI Film Products, 511 U.S. 244 (1994); Bowen v. Georgetown University Hosp., 488 U.S. 204, 208 (1988); and INS v. Enrico St. Cyr, 533 U.S. 289 (2001), all of which collectively held that, according to a mandatory two-step retroactivity analysis, there is a presumption against retroactive application of statutory amendments absent: 1) clear and unambiguous expressed intent by Congress; and 2) a finding that a new statute does not "take[] away or impair[] vested rights acquired under existing laws, or create[] a new obligation, impose[] a new duty, or attach[] a new disability, in respect to transactions or considerations already past." St. Cyr, 533 U.S. at 321; Landgraf, 511 U.S. at 269. It was also contrary to this Court's decision in Kolkevich v. Attorney General of the United States, 501 F.3d 323, 336-338 (3d Cir. 2007), which held that a substantive limitations amendment extinguishing a pre-existing claim can be valid where reasonable time to preserve claims is provided and clear Congressional intent to extinguish pre-existing claims existed.

Appellees seek Panel Rehearing because the Panel also improperly dismissed "all causes of action

prior to May 1, 2005" (emphasis supplied) notwithstanding the fact that, because this matter was before the Panel on interlocutory appeal on the discrete issue of retroactivity of the time limitation in IDEA-2004, Appellees' other claims regarding the statutory exceptions to IDEA-2004's limitations period have not been decided by the District Court, or addressed by this Court. Therefore, remand for consideration of these claims should be ordered.

Panel Rehearing is also requested in that the Panel committed a clear factual error in concluding that Appellees failed to raise, and thus waived, the argument that the School District failed to notify the family of the new time limitation under IDEA-2004 prior to the effective date of the Act. Appellees clearly and unambiguously raised this issue in the administrative process and in their Motion for Summary Judgment in the District Court.

II. Argument

A. Rehearing En Banc is Warranted In That The Panel Opinion is Contrary to Controlling Precedent of the United States Supreme Court and A Prior Decision of this Court

Recent Supreme Court precedent prohibits retroactive application of statutes, including of limitations, absent express intent by Congress. In Landgraf, 511 U.S. 244 (1994), the Supreme Court explained that the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." Id. at 265. There is a

presumption against retroactive application of statutes. Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939, 946 (1997). "The courts, therefore, require from Congress a 'clear intent' that the law should apply to earlier conduct to 'assure[ ] that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.'" Id. "Congressional enactments... will not be construed to have retroactive effect **unless their language requires this result.**" Bowen, 488 U.S. at 208; St. Cyr, 533 U.S. at 316. Moreover, congressional intent that a statute be applied retroactively must be clear and unambiguous. St. Cyr, 533 U.S. at 316-317. Those cases in which the Court has found truly retroactive effect have involved statutory language that was "so clear that it could sustain only one interpretation," as "the standard for finding such unambiguous direction is a demanding one." Id.

The Supreme Court again endorsed this two-step retroactivity analysis in St. Cyr.

The Panel recognized that this interlocutory appeal required it to resolve a conflict among the Pennsylvania district courts on the discrete issue of retroactive application of a time limitation for claims existing under IDEA prior to the effective date of the amended Act. Several Pennsylvania district court judges have recognized the applicability of Landgraf and its progeny to this issue - and decided in favor of Appellees' position. Tereance D. v. Sch. Dist. of Philadelphia, 570 F.Supp.2d 739, 744 (E. D. Pa. 2008)(Yohn, J.); Steven L., et al. v. Central Bucks Sch. Dist., Civil Action No. 08-571 (Padova, J.); Laura P. v.

Haverford Sch. Dist., No. Civ. A. 07-5395, 2008 WL 5000461 (E. D. Pa. Nov. 21, 2008)(Sanchez, J.); J.L. v. Ambridge Area Sch. Dist., No. Civ. A. 06-1652, 2009 WL 1119608 (W. D. Pa. Apr. 27, 2009)(Fischer, J.) Nevertheless, the Panel almost completely discounted the applicability of the required two-step retroactivity analysis of Landgraf, instead holding that a seven-month delay – without even a hint, let alone an express statement of intent of retroactive application - between the passage of the Act and its effective date constitutes "reasonable notice" to potential plaintiffs (who are children with disabilities and their parents) that claims which accrued prior to the amended Act would be forever extinguished on the effective date of the Act.

Specifically, the Panel concluded that because the "statute of limitations provision" became effective approximately seven months after the passage of the Act, this somehow constituted a silent seven-month "grace period" which Congress "wrote" into the statute. The Panel's conclusion that IDEA-2004 contained a "seven month period between enactment and the effective date" provided a reasonable notice period for potential plaintiffs of the need to file for a due process hearing in order to avoid IDEA-2004's statute of limitations for claims which accrued when the Act had **no statute of limitations** is directly contrary to controlling Supreme Court authority. Indeed, the Supreme Court has made very clear that the mere fact that Congress provided an effective date for a statute affords no support for a claim that the statute is to be given retroactive effect:

> "The mere promulgation of an effective date for a statute does not provide sufficient assurance

> that Congress specifically considered the potential unfairness that retroactive application would produce. For that reason, a statement that the statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date."

St. Cyr, 533 U.S. at 316-317 (some internal punctuation and citations omitted).

The Panel's decision was also contrary to this Court's prior decision in Kolkevich v. Attorney General of the United States, 501 F.3d 323, 336-338 (3d Cir. 2007), which held that a substantive limitations amendment extinguishing pre-existing claim was permissible, but only when reasonable time to preserve claims is provided and clear Congressional intent to extinguish pre-existing claims existed. The Panel did not discuss the Kolkekvich decision in its ruling despite a discussion of the case in supplemental briefing requested by the Panel.

Moreover, this alleged period of "reasonable notice" did not, in fact, provide **any** notice of any **new** duty to bring claims which existed under an Act **with no statute of limitations**. At most, this seven-month delay arguably provided potential plaintiffs with notice of a new time limitation to claims relating to conduct occurring on July 1, 2005 or after. However, there is simply **nothing** in the 2004 Amendments to IDEA - including the seven-month hiatus between the passage of the Act and its effective date - which could possibly alert potential plaintiffs that the new time limitations period would apply retroactively to claims prior to July

1, 2005 - claims which accrued when no time limitation existed.

Moreover, this Court has already stated that IDEA-2004 is not to be applied retroactively, Lawrence Township Bd. of Educ. v. New Jersey, 417 F.3d 368, 370 (3d Cir. 2005)("amendments to IDEA have prospective application only"), and previously held that other amendments to IDEA are not given retroactive effect. Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, n.3 (3d Cir. 1999) (same determination regarding IDEA-1997 amendments as lacking retroactive effect); cf. Jaffees v. Council Rock Sch. Dist., No. Civ. A. 06-0413, 2006 WL 1722416 (E. D. Pa. June 19, 2006). Thus, even the most savvy parent of a disabled child could not have suspected that IDEA-2004 would be given retroactive effect without some specific statement of retroactivity in the Act.

The Panel discounted the applicability of Landgraf and St. Cyr, appearing to conclude that the time limitation in IDEA is more procedural in nature than substantive, such that its application here did not implicate retroactivity concerns. Amendments to a statutory limitations period are not procedural, but substantive, when they create a new legal consequence of extinguishing pre-existing rights. This Court has held that such amendments have impermissible retroactive effect and cannot be applied retroactively absent notice and clear Congressional intent to do so. Mathews v. Kidder Peabody & Co., Inc., 161 F.3d 156, 166 (3d Cir. 1998), cert. denied, 526 U.S. 1067 (1999) (ostensibly procedural jurisdictional amendment was substantive where it destroyed a cause of action); Kolkevich v. Attorney General of the United States,

501 F.3d 323, 336-338 (3d Cir. 2007) (statutory limitations amendment extinguishing pre-existing claim was substantive but allowed, when reasonable time to preserve claims is provided and clear Congressional intent to extinguish pre-existing claims existed); Monson v. U.S., 516 F.3d 163 (3d Cir. 2008); Collins v. Montgomery County Board of Prison Inspectors, 176 F.3d 679 (3d Cir. 1999) (amendments extinguishing pre-existing claims are substantive and have impermissible retroactive effect); Matheson v. Virgin Islands Community Bank, Corp., 297 F.Supp.2d 819 (D. Virgin Islands 2003).

Indeed, the Panel appeared to completely overlook the unique, complex and substantive nature of the limitations provisions in IDEA. IDEA - which had no statute of limitations prior to July 1, 2005 - does not contain a typical, automatic and inflexible "statute of limitations." Instead, the limitations period under IDEA-2004 establishes two district time periods, and additional statutory exceptions which are interwoven with IDEA's substantive requirements. The first time period is a procedural one and involves the time during which a parent must request due process after learning of the educational deprivation. 20 U.S.C. § 1415(f)(3)(c) ("within two years of the date the parent or agency knew or should have known about the illegal action that forms the basis of the complaint"). The second time period involves a very different, more substantive determination, and entails the adjudication of the actual period of educational deprivation beginning at a point two years prior to the date when the parent or agency learned of the deprivation. 20 U.S.C. § 1415(b)(6)(B). Subsection 1415(b)(6)(B) requires a hearing officer to consider a complaint:

> which sets forth an alleged violation that occurred *not more than 2 years before the date the parent or public agency knew or should have known about the alleged action* that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this part, in such time as the State law allows, *except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this paragraph.*

20 U.S.C. § 1415(b)(6)(B) (emphasis added). The IDEA therefore does not create a simple "two-year statute of limitations," but rather a two-year procedural period to bring a claim after the parent knew (or reasonably should have known) of the existence of the claim. Then, Section 1415(f)(3)(c) authorizes the Hearing Officer to adjudicate substantive claims which began at a point two years before the parent or school entity knew or should have known of the educational deficiency. 20 U.S.C. § 1415(f)(3)(c).

IDEA also creates broad statutory exceptions which are part of IDEA's substantive protections and which permit claims well beyond the two-year period from the parents' knowledge of the existence of the legal claim being raised. Section 1415(f)(3)(D) permits parents to raise claims during a period where the district failed to provide information mandated by IDEA, including:

> "(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

> (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent."

20 U.S.C. § 1415(f)(3)(D). Thus, IDEA's time limitation provisions comprise three segments, all of which are inextricably and uniquely tied to the student's substantive rights under the statute.

The Panel also gave no consideration to the fact that IDEA is a remedial statute designed to protect a class of children with disabilities, and therefore must be construed liberally in favor of the protected class, such that exemptions from the protections of the statute (such as excluding claims via a silently retroactive statute of limitations) must be narrowly construed. Markowitz v. Northeast Land Co., 906 F.2d 100, 105 (3d Cir. 1990); Smith v. Fidelity Consumer Discount, 898 F.2d 896, 898 (3d Cir. 1990); William v. Empire Funding, 109 F.Supp. 2d 352, 357 (E. D. Pa. 2000). Indeed, IDEA protects the rights of children with significant impairments; not only are they minors, but they are disabled minors. Thus, as a class of plaintiffs they differ significantly from, for example, an adult worker bringing a charge of discrimination, an adult plaintiff asserting rights to land, or a criminal asserting post-conviction rights. Particularly in light of the class of plaintiffs affected by the Panel's ruling, the new time limitations in IDEA should not be used as a silent procedural mechanism to bar claims of disabled minors which existed prior to the effective date of the Act.

Finally, the Panel seemed troubled by a potential gap in claims if IDEA-2004's limitations period is not applied retroactively, referring to this result as "bizarre" and one that Congress could not have intended. However, Congress was surely capable of foreseeing this entirely foreseeable result, and equally capable of expressly making the new limitation period retroactive as required by recent Supreme Court decisions, yet it chose not to include an explicit statement of intent of retroactivity in IDEA-2004. Further, the Panel appeared to overestimate the number of cases likely to be affected, since potential plaintiffs who could assert rights prior to 2005 are each year progressing toward the end of their IDEA eligibility at ages between 18 and 21. Indeed, this matter is the first to reach this Court in the five years since the passage of IDEA-2004.

B. Panel Reargument Is Warranted Because the Panel Improperly Dismissed All Causes of Action Prior to May 1, 2005 Notwithstanding the Fact That, Because This Matter Was Before the Panel On Interlocutory Appeal, Plaintiffs' Claims Regarding the Statutory Exceptions To IDEA-2004's Limitations Period Have Not Been Decided By the District Court.

In their Motion for Summary Judgment (and in the administrative proceedings), Appellees also argued that even if IDEA-2004's time limitation were applied retroactively, they had established the statutory exceptions to any limitations period such that no limitation may apply.

Because he found the statute of limitations did not apply retroactively to Plaintiffs' claims, Judge Padova **did not reach** the issue of whether the statutory exceptions to the new limitations period of IDEA-2004 apply here. Nor did Judge Padova have occasion to address the interrelationship of the second section of IDEA relating to time limitations which can also extend the two year period noted above. 20 U.S.C. Section 1415(b)(6)(B). Rather, this appeal arose when the Defendant/Appellant requested **interlocutory review of the discrete single issue of retroactivity**, which was the only issue decided by the District Court, and thus the only issue before the Panel. Thus, the District Court has not decided Plaintiffs' claims with regard to the statutory exceptions to the limitations period in IDEA-2004 or the interplay of Section 1415 (b)(6)(B) under the facts at bar. Nevertheless, the Panel ruled that, somehow, the statute of limitations "applies to Steven I.'s claims and bars **all** causes of action prior to May 1, 2005" (emphasis added) without any mention of the statutory exceptions claims raised by Appellees, but not yet decided, in the District Court. Accordingly, the Panel's decision must be amended to order remand to the District Court for disposition of these remaining undecided issues.

C. Panel Reargument is Warranted In That The Panel Committed Error In Concluding That Appellees Waived Claims Regarding the School District's Failure to Provide Parents With Procedural Safeguards To Alert Them To a New Statute of Limitations.

The Panel states that:

"Steven I. mentions for the first time that IDEA 2004, 20 U.S.C. §§ 1415(d)(1)(A) and (d)(2)(E)(1), requires School Districts to give parents a procedural safeguards notice once each year that includes the time period in which to make a complaint. Steven I. states that this requirement provides an affirmative defense and that the School District did not prove that they specifically informed Steven I.'s parents of IDEA 2004's new statute of limitations prior to the effective date. However, Steven I. did not raise this issue before the District Court or in his initial brief on appeal, so it is waived."

This is simply incorrect, both factually and legally. At pages 26-27 of their Motion for Summary Judgment in the District Court, Appellees argued the following:

> 'The District was aware at least by October 2004 when IDEA-2004 was passed that a statute of limitations period had been included in IDEA-2004 which would be effective on July 1, 2005. The District should have advised Parents of the statute of limitations at the last IEP meeting in December of 2004 or via a notice any time thereafter mailed to the family home. 20 U.S.C. §§1415(d) (Notice to parents of procedural safeguards, including time to file complaints). Indeed, at the last IEP meeting conducted in December of 2004, despite the District's awareness of a statutory timeline contained in the re-authorized IDEA-2004 coming into effect less than one month after Steven's scheduled graduation, the District admitted they failed to advise Steven's Parents of any statute of

> limitations. N.T. 321-322. Thus, the District could and should have provided Parents with this information."

At the due process hearing, Steven's counsel questioned Steven's teacher and IEP case manager regarding the issue of whether the District had provided the parents with procedural safeguards notices which informed them of an imminent statute of limitations, and the stated she had not. A-222. Counsel also questioned that witness as to whether she informed the parents of a new time limitation at Steven's last IEP meeting, and the witness testified she had not. A-222. Counsel further questioned the District's Supervisor of Special Education as to whether any of the procedural safeguards notices which the District provided to the family from 1997 through June 17, 2005 (a mere two weeks before the effective date of IDEA-2004) contained notice of a new statute of limitations, and the Supervisor admitted they did not. A-300. She further admitted that the District did not provide the parents with any written communication regarding a new statute of limitations. A-300. The Parents' opening argument also made clear that one issue for the hearing was that the District failed to provide the parents notice of the new time limitation. A- 122. Thus, Appellees clearly raised this issue throughout the full course of this litigation.

The Panel states that "even if we were to consider this issue, Steven I. graduated prior to the effective date of the statute of limitations so it is unclear whether the School District even had an obligation to inform Steven I.'s parents of the new statute of limitations." However, this issue, though

properly raised in the District Court, has also not been decided below.

In any event, the decision cited by the Panel in support of its determination that Steven I. waived these arguments is not even applicable to Steven I. and his parents as Appellees. Indeed, on page 8, note 12 of its decision, the Panel inexplicably cited United States v. Pelullo, 399 F.3d 197, 222 (3d Cir. 2005) for the proposition that "[i]t is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal." (emphasis added). Naturally, since the role of an Appellee is to respond to an Appellant's claims, no waiver can be found where an appellee does not address an issue which was not decided in the District Court and was thus not addressed in the Appellant's opening brief.

WHEREFORE, Appellees respectfully request Panel Reargument and Rehearing En Banc on the foregoing issues.

Respectfully submitted,

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Gabrielle C. Sereni, Esquire

_____

Dennis C. McAndrews, Esquire
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July 1, 2010

United States Court of Appeals For the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Letter Brief of Appellant, Central Bucks School District Steven 1, et al. v. Central Bucks School District Case Number: 1011791 District Court Case Number: 2-08-cv-00571

Dear Members of the Court:

This letter brief is submitted by Appellant, the Central Bucks School District ("the District") in response to the directive of the Court as stated in correspondence from Marcia M. Waldron, Clerk to the parties' counsel dated June 24, 2010 that counsel comment on the "retroactivety of statutes of limitations" as discussed in the three federal court cases referenced below. The key principles from these cases are: (1) a statute of limitations is generally not applied retroactively if the

claim./lawsuit was. filed after the statute's effective date and application of that statute bars claims related to facts occurring before the effective date, (2) the limitations period/statute is procedural, not substantive and (3) a party must have a reasonable opportunity to bring a claim and if so a statute of limitations will be applied.

In Vernon v. Cassadaga Valley Central School District, 49 F.3d 886 (2d Cir. 1995), the Court held that the ninety day limitations period enacted in the Civil Rights Act of 1991 on November 21, 1991 applied to civil rights claims filed after this limitations period's enactment, including to those claims in which the cause of action accrued beforehand. Id. at 889. The events supporting Plaintiffs' claim occurred in February, 1991, approximately nine months before the effective date of the ninety-day limitations period. The limitations period was amended approximately four months after Plaintiffs' filed their complaints with the New York State Division of Human Rights and the Equal Employment Opportunity Commission. Id. at 887-888. Moreover, after the filing of their complaints, Plaintiffs actually received inaccurate written communications from these administrative agencies advising that the two-year statute of limitations applied to their claims. Subsequently, Plaintiffs received an EEOC right to sue letter which identified the need to file a lawsuit within ninety days of receipt of the right to sue letter. Plaintiffs filed their complaint nineteen months after the effective date of the amended limitations period and over three months after the expiration of that limitations period.

The Second Circuit's retroactivity analysis properly focused on a few key concepts. First, the Court recognized that the application of a new or amended statute of limitations to bar a cause of action filed after its enactment, but arising out of events that predated its enactment, generally is not considered a retroactive application of the statute. Id. at 889, citing *Smith v. Zeneca, Inc., 820* F.Supp. 831 (D. Del. 1993), aff'd, 37 F.3d 1489 (3rd Cir. 1994) (other citations omitted). In such a circumstance, the statute of limitations is applied to conduct that occurs after the statute's enactment, such conduct being Plaintiffs' filing of a complaint and not the Defendant's allegedly unlawful acts that occurred before the statute's effective date. Id. at 889 (citation omitted). In sum, the conduct to which the new statute of limitations refers is Plaintiffs' conduct in the filing of a claim and *not* the Defendant's conduct which gave rise to the claim. Id. at 890. As such, the Second Circuit determined that retroactivity *concerns* generally do not bar the application of an amended statute of limitations to a complaint which is filed after the amendment, just as what factually tlineoccurred in the *Steven I, case* herein. The second basis in support of the Court's determination was that a statute of limitations should be treated differently from statutory provisions that affect substantive rights in regard to the issue of retroactivity. Id, at 890891. The Court described in detail the United States Supreme Court's analysis *in Landgraf v. U. S.I Film Products, 511 U.S. 244,114 S.Ct. 1483 (1994)* in which the Supreme Court recognized that even without specific authorization by the legislature, the application of a new statute of limitations which became effective after the occurrence of the underlying claim-related events is "unquestionably proper in many situations." Id. at , 114

S.Ct. at 1501. The determination of whether it is proper is founded on the recognition that the conduct to which the statute of limitations relates is not the alleged factual basis for the claim, but instead the Plaintiffs' procedural conduct in the filing of a claim or lawsuit. *Vernon, 49* F.3d at 890. Moreover, any argument by Appellees that the IDEA-2004 limitations period is substantive because it includes exceptions which involve factual analysis should be rejected. 20 U.S.C. § 1415(f)(3)(C). In this case, the Hearing Officer determined that Appellees failed to establish either exception to the two-year limitations period which was their burden, and this specific finding was not reversed by the District Court so the exceptions have no relevance to this analysis. (A78-81).

In the decision by United States Court of Appeals for Tenth Circuit *in United States v. Simmonds, 111 F. 3d. 737 (10th Cir. 1997)*, the Court held that the application of a one-year statute of limitations related to a post-conviction relief motion was impermissibly retroactive. However, the *facts in Simmonds are* clearly distinguishable, as the application of the one-year statute would have directly and irrevocably extinguished the Petitioner's right to file a-motion for post-conviction relief without giving the Petitioner any reasonable time whatsoever to file that motion. Specifically, Petitioner's convictions occurred in 1990 and he subsequently challenged the convictions on a direct appeal which was denied. The Anti-Terrorism and Defective Death Penalty Act, at 28 U.S.C. §2255, was amended to preclude a prisoner from filing a Section 2255 motion more than one year after the conviction becomes final. This amendment did not contain an express effective date provision and thus,

the effective date was the date, of April 24, 1996 when the bill was enacted into law. Id. at 745, fn. 10. The actual application of this amendment would have barred Petitioner's motion as of October 7, 1992, which was more than three years before the amended statute's effective date. The 10th Circuit recognized that generally, retroactivity concerns do not bar a change in limitations period's application to a suit which is filedafter the amendment's effective date. Id. at 745 (citations omitted). However, the Court understandably recognized that the application of a new statute of limitations cannot be "so unfairly applied to bar a suit before the claimant had a reasonable opportunity to bring it." Id. at 745. In sum, the issue is whether the party was afforded a full opportunity to try his/her rights in Court, as compared to being subject to an unlawful and arbitrary extinguishment of rights. The Court reasonably determined that retroactive application of the oneyear statute would be entirely unfair, severe and would result in Plaintiffs being stripped of his rights without prior notice or opportunity to act. Id. at 745. That is absolutely not the case *in Steven* I. - to the contrary, the IDEA amendments were signed into law on December 3, 2004 'and an approximate seven-month notice period existed before the limitations period even became effective. Appellees herein waited until long after that effective date and actually did not file their claim until May 1, 2007. Appellees could have filed anytime they chose before then, including the many years before 2005, but failed to do so. Regardless, they were afforded a reasonable opportunity to act.

The remedy applied by the *Simmonds* Court was the mandate that prisoners whose convictions became final

on or before the effective date of the one-year limitations period must file their motions within one year of that effective date. That remedy was directly linked to a singular event, specifically a conviction which occurred before the effective date. That remedy was not, nor should it be in this case, the authorization of a party to pursue unbridled claims related to a collection of facts which occurred prior to July 1, 2005, which was the effective 'date of the two-year limitations period under the IDEA. In sum, allowing the appeal of a singular criminal conviction during the one-year period after that statute's effective date is dramatically distinct from allowing Appellees to have an unlimited ability to pursue claims for any facts which occurred prior to the effective date.

In Wilson v. Iseminger, 185 U.S. 55, 22 S.Ct. 573 (1902), the Supreme Court addressed whether the statute of limitations in an 1855 statute can be applied to the obligation for ground rent which arose prior to the passage of that statute. Id at 62. The Court held that it applied to such obligations. Specifically, a ground rent deed between the parties was entered into in January, 1854' and ground rent was subsequently claimed for the years 1887 to 1896. Id. at 56. The Supreme Court recognized that all statutes of limitations must proceed on the concept that the party has a full opportunity to try his/her rights in court based on the allowance of a reasonable time for the commencement of suit. Id. at 62. The consideration of a reasonable time must be determined by the legislative judgment. Id at 62-63. The Court emphasized that statutes of limitations affecting existing rights are not unconstitutional if a reasonable period of time is provided for the commencement of an action before the

statutory limitation period takes effect. Id. at 63. (citations omitted). Importantly, the Court noted that the parties to a contract have no more a vested interest in the particular limitation which has been fixed than they have in an unrestricted right to sue. Id. at 63. *(Korn v. Browne, 64* Pa. 57). The Court's analysis was founded on what was reasonable under the circumstances. Id. at 63 (citing Turner v. New York, 168 U.S. 90, 42 Led. 392). As stated, Appellees herein, including Student who was of the age of majority before the IDEA two-year limitations period became effective, had a reasonable opportunity to file their claim before July 1, 2005, but failed to do so. The two-year statute of limitations should bar all claims before May 1, 2005.

Very truly yours,
Scott H. Wolpert

Marcia Waldron, Clerk ,United States Court of Appeals
For the Third Circuit
601 Market Street
Philadelphia, PA 19106

Re: Steven I., et al v. Central Bucks Sch. Dist., Case No: 10-1179

Dear Ms. Waldron:

Appellees hereby file this letter brief as directed by the Court on June 24, 2010 to discuss the decisions in Wilson v. Iseminger, 185 U.S. 55 (1902); Vernon v. Cassadoga Valley Central School District, 49 F.3d 886 (2d Cir. 1995); and United States v. Simmonds, 111 F.3d 737 (10th Cir. 1997). Wilson fully supports the position of Stephen I., as the statute in Wilson created an explicit grace period to bring claims under the new statute of limitations, thus providing the clear statement of retroactive effect required by subsequent Supreme Court decisions. Unlike the statute in Wilson, IDEA-2004 created no such explicit grace period for its new time limitations. IDEA-2004's general delay of several months in implementing the expansive changes in the Act (which went well beyond the new time limits) was plainly not the type of "grace period" required by Wilson, especially since no notice of either retroactivity or a grace period was provided within IDEA-2004, and the School District also provided no such notice to parents regarding the time to bring an action as mandated by IDEA. Moreover, the jurisprudence of the Supreme Court concerning retroactivity has been substantially clarified and expanded by the Supreme Court in the century following its 1902 decision in Wilson. Over the past 20 years, the Court has

extensively discussed the inherent difficulties and potential unfairness or retroactive statutes. In the Court's recent decisions, expansive protections have been delineated to guard against such inherent unfairness. Most notably, the Supreme Court made abundantly clear in INS v. Enrico St. Cyr, 533 U.S. 289 (2001) - which **post-dates all three cases above** - that an act may not act retroactively "absent a clear indication from Congress that it intended such a result." St. Cyr, 533 U.S. at 316 (citing Landgraf v. USI Film Products, 511 U.S. 244 (1994)). Intent that a statute have truly retroactive effect has only been found where the "statutory language that was so clear that it could sustain only one interpretation." St. Cyr, 533 U.S. at 316 (citing Lindh v. Murphy, 521 U.S. 320, 328, n. 4 (1997)). As the District Court and the courts in Tearance D. v. School Dist. of Philadelphia, 570 F.Supp.2d 739, 747 (E. D. Pa. 2008) and Laura P. v. Haverford Sch. Dist., No. Civ. A. 07-5395, 2008 WL 5000461 (E. D. Pa. Nov. 21, 2008) all recognized, IDEA contains no such statement of retroactivity and the School District has failed to point to any such expression. Vernon and Simmonds upheld the requirement that the legislature must clearly state its intent to act retroactively, and further emphasized that no retroactive effect may occur without notice and a reasonable period afforded to preserve claims under the pre-existing statute.

Under Landgraf, the court must determine whether the statute has impermissible retroactive effect, i.e., whether it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations

already past . . . .' " Landgraf, 511 U.S. at 269. There was no time limitation applicable to claims for compensatory education in Pennsylvania prior to IDEA-2004. As the District Court held, "[c]onsequently, applying the two-year statute of limitations to Plaintiffs' claim for compensatory education would 'have the impermissible effect of impairing rights Plaintiffs possessed prior to the amendment. The new provision would attach new legal consequences to events completed before the amendment's effective date.'" See, also, Laura P., 2008 U.S. Dist. LEXIS 96190, at *41, 2008 WL 5000461; Tearance D., 570 F.Supp.2d at 748. Amendments to a statutory limitations period are not procedural, but substantive, when they create a new legal consequence of extinguishing pre-existing rights. Such amendments have impermissible retroactive effect and cannot be applied retroactively absent notice and clear Congressional intent to do so. Mathews v. Kidder Peabody & Co., Inc., 161 F.3d 156, 166 (3d Cir. 1998), cert den. 526 U.S. 1067 (1999) (ostensibly procedural jurisdictional amendment was substantive where it destroyed a cause of action). *See also*, Simmonds; Kolkevich v. Attorney General of the United States, 501 F.3d 323, 336-338 (3d Cir. 2007) (statutory limitations amendment extinguishing pre-existing claim was substantive but allowed, when reasonable time to preserve claims is provided and clear Congressional intent to extinguish pre-existing claims existed); Matheson v. Virgin Islands Community Bank, Corp., 297 F.Supp.2d 819 (D. Virgin Islands 2003); Monson v. U.S., 516 F.3d 163 (3d Cir. 2008); Collins v. Montgomery County Board of Prison Inspectors, 176 F.3d 679 (3d Cir. 1999) (amendments extinguishing pre-existing

claims are substantive and have impermissible retroactive effect).

Retroactive application of IDEA-2004's amendments to impact past claims is particularly inappropriate under several scores. First, no plain statement was provided by Congress to place citizens on notice of any extinguishment of past claims; surely Congress was aware of the requirement to plainly state any retroactive effect under the extant Supreme Court decisions. The Supreme Court reiterated in the years following Vernon and Simmonds that, "The mere promulgation of an effective date for a statute does not provide sufficient assurance that Congress specifically considered the potential unfairness that retroactive application would produce. For that reason, a statement that the statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." St. Cyr, 533 U.S. at 316-317. The mere addition of a time limitation - without clear expression of Congressional intent to limit pre-existing claims- simply does not afford citizens notice of a new duty to bring claims which existed under a statute that contained no time limitations.

Second, the limitations on future claims brought under IDEA - 2004 is so plainly and thoroughly interwoven with the disabled child's substantive rights so as to be a substantive part of IDEA rather than some mere "procedural mechanism" as found in Vernon and Simmonds with respect to very different statutes. The language of the IDEA does not create a "two-year statute of limitations," but rather establishes two district time periods, together with exceptions to these periods. The first time period involves the time during

which a parent must request due process after learning of the educational deprivation. 20 U.S.C. § 1415(f)(3)(C) ("within two years of the date the parent or agency knew or should have known about the illegal action that forms the basis of the complaint"). The second time period involves a very different, more substantive determination, and entails the adjudication of the actual period of educational deprivation beginning at a point two years prior to the date when the parent or agency learned of the deprivation. 20 U.S.C. § 1415(b)(6)(B). Subsection 1415(b)(6)(B) requires a hearing officer to consider a complaint "which sets forth an alleged violation that occurred *not more than 2 years before the date the parent or public agency knew or should have known about the alleged action* that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this part, in such time as the State law allows, *except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this paragraph.*" 20 U.S.C. § 1415(b)(6)(B) (emphasis added). The IDEA therefore does not create a simple "two-year statute of limitations," but rather a two-year procedural period to bring a claim after the parent knew (or reasonably should have known) of the existence of the claim. Then, Section 1415(f)(3)(C) authorizes the Hearing Officer to adjudicate substantive claims which began at a point two years before the parent or school entity knew or should have known of the educational deficiency. 20 U.S.C. § 1415(f)(3)(c). Finally, IDEA also references broad exceptions which permit claims well beyond the two year period from the parents' knowledge of the existence of the legal claim being raised. Section 1415(f)(3)(D) permits parents to raise claims during a

period where the district failed to provide information mandated by IDEA, including: "(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or (ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent."20 U.S.C. § 1415(f)(3)(D). Thus, a factfinder must look to a variety of factors with regard to the District's obligations to provide information to families to determine 1) when the time period for filing begins, 2) the time period for adjudication prior to the time that the parents should have known of the claim, and 3) whether any exceptions relating to the child's receipt of FAPE and the necessary procedural safeguards have been fulfilled. IDEA's time frames are thus interwoven with the substantive rights of the child, and render IDEA's time periods far more substantive in nature than the mere procedural mechanisms in Vernon and Simmonds.

Third, this Court has twice unequivocally held that amendments to IDEA are to be applied only prospectively, and has done so under both the IDEA - 2004 amendments and the IDEA - 1997 amendments. Lawrence Township Bd. of Educ. v. New Jersey, 417 F.3d 368, 370 (3d Cir. 2005);Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, n.3.

Fourth, the injured party under IDEA labors under two major legal impediments – the plaintiff is a minor child and an individual with a disability. This fact alone distinguishes cases under IDEA from the Wilson, Vernon, and Simmonds cases, which involved property owners, employees, and criminals. The nature of the injured party in IDEA matters makes the plain

statement required by INS and its predecessors particularly critical, especially since IDEA is a remedial statute which must be interpreted liberally on behalf of the beneficiary of the statute. Markowitz v. Northeast Land Co., 906 F.2d 100, 105 (3d Cir. 1990); Smith v. Fidelity Consumer Discount, 898 F.2d 896, 898 (3d Cir. 1990).

Fifth, the new Statute of Limitations is an affirmative defense which must be pled and proven by the School District, and IDEA expressly requires that a School District's Procedural Safeguards Notice must inform families in plain and understandable terms of the time in which to bring an action. 20 U.S.C. Section 1415 (d)(2)(E)(1)(procedural safeguards notice must inform parent of "the time period in which to make a complaint"). The School District in this matter presented no proof that this mandated information was provided to the plaintiffs.

Respectfully submitted,

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Dennis C. McAndrews, Esquire

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Gabrielle C. Sereni, Esquire

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MARCIA M. WALDRON

June 24, 2010

Gabrielle C. Sereni Esq.
Scott H. Wolpert Esq.

RE: Steven I., et al v. Cent Bucks Sch Dist
Case Number: 10-1179
District Case Number: 2-08-cv-00571

Dear Counsel:

At the direction of the Court, counsel is hereby directed to submit 3 page letter briefs within 7 days commenting on the "retroactivity" of statutes of limitation as discussed in *Vernon v. Cassadaga Valley Central School District*, 49 F.3d 886 (2d Cir. 1995), *United States v. Simmonds*, 111 F.3d 737 (10th Cir. 1997) and *Wilson v. Iseminger*, 185 U.S. 55 (1902).

Please file the responses to the Court's letter using the "response event"under the argument notices and acknowledgment category in CM/ECF.
Very truly yours,

Marcia M. Waldron, Clerk

By:
Carmen Hernandez, Calendar Clerk
267-299-4952